Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALBERT AKINS, ET AL.,
*PETITIONERS*

v.

ZENECA, INC.,; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
*RESPONDENTS*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VOLUME I

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a Union may represent separate bargaining units with conflicting interests and discriminate in favor of one unit.

2. Whether Petitioners who fully performed their part of the bargain may be denied performance promised in the contract where both plants signed the contract and both employer Respondents who purchased the separate plants assumed the obligations to Petitioners.

3. May Petitioners' contract rights be surrendered by third parties (ICI bargaining unit) where neither Petitioners nor their bargaining unit ever approved or authorized such a surrender?

4. Is there a contract violation where the Union Constitution provides:

a. that any contract affecting rights of members must be submitted to the members affected for approval [Article XXIV(11)(e)] and the Union refuses to submit such a contract to the affected members for approval;

b. that the International Union shall enforce the Constitution [Article VI(5) and (3)] and it refuses to enforce provisions of the Union Constitution requiring the submission of a contract affecting the rights of members to such members for approval;

c. that the International Union is authorized to interpret the Constitution [Article VI(2)] but when

requested, refuses to interpret a clear provision of the Constitution requiring submission of a contract affecting members' rights to the affected members for approval;

d. that the International Union has power to compel the faithful performance by the Local Union of its duty of fair representation [Article VI(3) and (5)] but it refuses to take any action when it has knowledge (1) that the Local Union plans to discontinue a grievance on behalf of Petitioners because of its duty of fair representation to other members in another bargaining unit and (2) that the Local Union is acting adversely to Petitioners, favoring the ICI bargaining unit over Petitioners' unit?

5. Whether Respondents have conspired to injure Petitioners where:

a. the Union, for approximately one year, falsely advises Petitioners that their rights cannot be affected by actions of the other bargaining unit when the Union knows Petitioners' rights will be affected;

b. an employer exploits the conflict of interest situation and demands that the Union favor the other bargaining unit;

c. layoffs are postponed just long enough to permit the other bargaining unit to execute a contract affecting Petitioners' rights;

d. the Union refuses to process a grievance on behalf of Petitioners because of the Union's duty of fair representation to the other bargaining unit;

e. the Union refuses to advise whether a contract with another bargaining unit, which will affect Petitioners' rights, must be submitted to Petitioners or their bargaining unit for approval;

f. the Union files a sham declaratory judgment action as a "friendly lawsuit" between Respondents and for nearly eight months no Respondent files a motion for summary judgment or dismissal;

g. the Union immediately after the new contract with the other bargaining unit is approved, notifies Petitioners their rights have been destroyed and the Respondents stipulate a dismissal of the sham declaratory judgment action; and

h. the corporate Respondents are not parties to the contract of the Union Constitution.

6. Is the International Union liable for its own acts and the acts of the Local Union where:

a. it is a party and principal to the Constitutional contract rather than an agent;

b. the International Union, under the Constitution, has full control of the Local Union;

c. the International Union participates in all negotiations from 1982 through 1990;

d. the International Union refrains from any overt participation in the 1991 negotiations when it was aware Petitioners' rights were being destroyed; and

e. the International Union has prior knowledge and ratifies the actions of the Local Union.

7. Did the Court of Appeals usurp the function of the jury and ignore the standards for a Rule 56 summary judgment or a Rule 50 judgment as a matter of law by:

a. ignoring the findings of the District Court supported by voluminous evidence that the Union had failed to process a grievance on behalf of Petitioners because of the duty of fair representation it had to the other bargaining unit;

b. ignoring the findings of the District Court supported by voluminous evidence that there had been a "complete sell out" by the Local Union of Petitioners and their bargaining unit;

c. ignoring affidavits and other uncontroverted documentary evidence, including reasonable inferences therefrom, showing the employer's liability and the Unions' breach of its duty of fair representation; and

d. construing a severance pay agreement, which included a provision intended to except Petitioners' contract rights to transfer to the other plant from any

release to Rhone-Poulenc (signed by some Petitioners) and ignoring direct testimony that the additional clause was added to the agreement at Petitioners' insistence to preserve their transfer rights.

8. Did the International Union have a duty of fair representation to Petitioners?

## LIST OF ALL PARTIES

The Petitioners are listed as follows:

Albert Akins, Alfonzia Akins, Gene Barker, Ray Bassham, Russell Bishop, Thomas Bishop, Joe Blair, Sammy Boshers, Lonnie Bradburn, Dennis R. Butler, Waylon Carroll, Hazel Chapman, William Claude, Robert Gilliam, Danny Green, Michael Harlow, Gerald Isabell, Terry Jennings, Bobby Kelley, Milton Knowles, Douglas Lindsey, Michael Lindsey, Jimmy Lott, Roland McKnight, Raymond Neely, Terrance Nevette, David Osborn, David Paley, Rickey Patrick, Michael Pilkinton, Gary Riley, Andrew L. Scott, James R. Scott, Jr., Joseph Shyes, Sharon Liles Steiner, Kathy G. Thomason - Administratrix, Robert Tidwell, Joy Ward, Michael Whitwell and Geneva Wiggins.

The Respondents are as listed in the caption of this petition. At the trial level, there were sixty-eight (68) Plaintiffs. Forty (40) of whom, the Petitioners herein, appealed the District Court decision. The Respondent, Zeneca, Inc., changed its name from ICI Americas Inc. after it was granted summary judgment. (For clarity, Zeneca, Inc., is referred to herein as "ICI"; Rhone-Poulenc Inc. and Rhone-Poulenc Basic Chemicals Co. as "Rhone-Poulenc"; International Union of Operating Engineers, AFL-CIO as "International Union"; and Local 912 International Union of Operating Engineers, AFL-CIO as "Local 912".)

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause on July 27, 1995. Petitioners duly filed a motion for rehearing, which was denied on September 5, 1995.

## OPINIONS BELOW

None of the orders or opinions of the lower Courts has been reported.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The statute involved, Section 301 of the National Labor Relations Act, 29 U.S.C.A. § 185, is reproduced in the Appendix.

## STATEMENT OF CASE

Petitioners were employed for many years by Stauffer Chemical Company at two adjacent plants. Petitioners were members of Local 912 and as a condition of membership, automatically became part of the International Union. Their Union dues were split between Local 912 and the International Union. App. 33, 387, 309, 333, 334, 339.

Prior to 1982, there was a single collective bargaining contract governing both

plants. One plant was known as the "furnace plant" and the other was known as the "organic plant". App. 33.

In 1982, Stauffer Chemical Company insisted that the two plants be under separate Collective Bargaining Agreements. The employees agreed to separate contracts on condition that employees who had seniority to transfer between the two plants should retain a one time transfer right to the other plant. App. 32, 34, 337-343.

A separate written agreement was entered into on September 13, 1982, promising Petitioners and other qualifying employees a one time right to transfer to the other plant in the event of layoff at their plant. This agreement was commonly referred to as the "Cross-Bumping Agreement". It was also incorporated by reference into the separate Collective Bargaining Agreements for the two plants. App. 34, 36.

In 1987, ICI purchased both plants and operated them under the 1985 Collective Bargaining Agreements. Later in 1987, ICI sold the furnace plant to Rhone-Poulenc but retained the organic plant and continued to operate it under the 1985 Collective Bargaining Agreement for the organic plant executed by Stauffer Chemical Company. App. 37, 39.

Rhone-Poulenc operated the furnace plant under the 1985 Stauffer Chemical Company Collective Bargaining Agreement for the furnace plant. Both ICI and Rhone-Poulenc incorporated the Cross-Bumping Agreement by reference into the respective 1988 Collective Bargaining Agreements for the two plants. Rhone-Poulenc again incorporated the Cross-Bumping Agreement into its 1991 contract.[1] App. 39, 406.

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[1]At the trial, Rhone-Poulenc stipulated it was responsible for any liability of Stauffer Chemical Company and the action was dismissed as to Stauffer Chemical Company. App. 410-413, 165.

The Union (both International and Local) continued to represent both bargaining units after the execution in 1982 of the Cross-Bumping Agreement which established conflicting interests between the two bargaining units. The International Union participated in the 1982 negotiations and in the subsequent negotiations in 1985 and 1988 for both plants. App. 40, 344-365, 300, 321, 328, 337-343.

In an internal memorandum of 9/13/88, Rhone-Poulenc noted that it had reviewed the Cross-Bumping Agreement with ICI and that the furnace plant had 135 remaining employees with the described seniority. It further noted that "[a]s we have discussed, the liability, if any, rests with the Company that lays off and cannot force the remedy of the Agreement on the opposite Company". App. 228-235.

In the same memorandum of 9/13/88, Rhone-Poulenc concluded that "[i]f the cross bumping agreement represents a significant liability to the Company it then must also represent a significant asset to the employees". Rhone-Poulenc concluded that it must be resolved to compensate the employees for this asset. App. 228-235, 312.

On June 20, 1990, Rhone-Poulenc announced the closing of the furnace plant with layoffs, including Petitioners, to begin in February of 1991. As a result, Local 912, in a letter of June 26, 1990, to the International Union, requested an interpretation of XXIV(11)(e) of the Union's Constitution as it applied to Petitioners and the anticipated ICI contract renewal in June of 1991. App. 41, 236-247.

The letter pointed out that Petitioners' bargaining unit of 250 employees outnumbered the 125 employees in the ICI

bargaining unit. The concern was that Petitioners' bargaining unit would reject the ICI contract[2] and that the "end result" would be that Petitioners would bump less senior employees in the ICI bargaining unit, causing ICI employees to be laid off. In a nonsensical reply of July 27, 1990, the International Union, noting that the question presented was whether Petitioners should be allowed to vote on the ICI contract, failed to answer the question asked. App. 236-250, 42, 74-78.

On October 16, 1990, Local 912, with no attempt to utilize grievance procedures, filed a declaratory judgment action against ICI and Rhone-Poulenc requesting the Court to determine the validity of the Cross-Bumping Agreement and rights of the employees thereunder. No Respondent filed

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[2]The testimony of Mr. Carroll confirms the ICI contract would have indeed been rejected by the furnace plant bargaining unit. App. 296, 297.

a motion for summary judgment or dismissal in that "friendly lawsuit".[3] App. 255-259, 43, 328-331.

The layoffs scheduled for February, 1991, were postponed to begin the first week of July, 1991. The Union and the corporate Respondents waited eight months, knowing that the 1988 ICI contract would expire in June of 1991, thereby permitting ICI to agree with the ICI bargaining unit to remove the Cross-Bumping Agreement from the contract for the organic plant. App. 43-45, 310-313.

In a letter dated December 12, 1990 (App. 260-272), to Local 912 concerning the declaratory judgment action, ICI stated in part as follows:

> ... Thus, the only controversy revealed by the complaint is one between the Rhone-Poulenc employees and

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[3] In this case, which is much more complicated, ICI's motion to dismiss was filed (R. 20) in less than two months and Rhone-Poulenc's motion to dismiss or for summary judgment was filed three months after the complaint (R. 51).

the ICI employees, both of which groups the Union is supposed to represent. Unless and until the Union files in court a document claiming that the ICI employees (who the Union represents) should lose their jobs to laid off Rhone-Poulenc workers, there is no controversy between ICI and Local 912, and the case must be dismissed. We believe there is a serious question as to whether the officers of Local 912 are really ready to state in writing that ICI's workers should be put on the street in order to make way for laid off employees with lesser skills who are employed by another company.

...Local 912's representatives also would need to testify that they believe the ICI employees should be forced to give up their jobs to employees from Rhone-Poulenc.

...

....ICI is prepared at the same time to negotiate a preferential hiring arrangement whereby laid off Rhone-Poulenc workers, meeting agreed qualifications, would be hired at the Organic Plant as the Specialties group creates new

> employment opportunities in the future.
>
> ...
>
> In light of these factors, we recommend that your client seriously consider ICI's proposal. My instructions are to seek an early response and, absent meaningful progress toward agreement, to aggressively pursue dismissal of the lawsuit.[4]

From the closing announcement in June of 1990 through the execution of the new ICI contract on June 11, 1991, Local 912 continually represented to Petitioners that they did not have to be concerned about the ICI negotiations because the organic plant bargaining unit could not affect their rights. App. 44, 45, 298, 299, 309-312, 315-328, 334, 335.

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[4] In its letter, ICI listed numerous reasons the complaint was legally deficient on its face. Since ICI did not "aggressively pursue dismissal of the lawsuit", some agreement was apparently reached between ICI and the Union. Local 912 did not inform the Petitioners or any member of the bargaining unit for the furnace plant of the above settlement offer. App. 260-272, 300, 301, 331, 339.

Shortly after the execution of the June 11, 1991, ICI contract, at the next Union meeting, Local 912 informed the Petitioners for the first time that their rights under the Cross-Bumping Agreement had been terminated by the agreement between ICI and the bargaining unit for the organic plant. If Petitioners had known earlier that their rights could be affected by the organic plant bargaining unit, they would have insisted on participation. App. 296, 297, 44, 45, 299, 318.

No member from the bargaining unit at the furnace plant was permitted to participate in the negotiations relating to the organic plant. No member of the bargaining unit from the furnace plant ever agreed to or authorized the deletion of the September 13, 1982, agreement. The June, 1991 agreement between ICI Americas Inc. and Local Union No. 912 was never authorized or approved by, nor submitted to, the bargaining unit for

the furnace plant. (Paragraph 17 of complaint as admitted by answer of Local 912.) See also, App. 296, 297, 74, 75.

Petitioners requested assistance from the General President of the International Union by letter of July 10, 1991. They pointed out that Local 912 had a conflict of interest and appeared to be working against their best interest. App. 273-277, 415, 46.

By letter of July 16, 1991 (App. 278-290, 328-331, 337-343, 79-82), to the International Union, Local Union 912 stated in part as follows:

> ...In addition, I have talked with Richard Griffin and Helen Morgan in IUOE's legal department as to the general problem involved.
>
> ...
>
> ...Suppose Rhone-Poulenc grants the grievance! How can Local 912 make ICI take the employees from Rhone-Poulenc. If Local 912 goes to court in an effort to do

> so, where does that leave Local 912 with its members at ICI as to fair and proper representation? This is one of the dilemmas I discussed with Branstetter, our attorney. This is one of the reasons he recommended against the grievance route....I have sought guidance from your office and IUOE's legal department as well as Local 912's Attorneys.

By letter of August 5, 1991, the International Union contended erroneously it had no authority to intervene. The International Union further stated "that it appears that Local Union No. 912 has acted vigorously and in good faith...to protect the interest of all members." App. 291, 292, 81.

On September 27, 1991, Local 912 discontinued the grievance against Rhone-Poulenc. It notified Petitioners that Local 912 would take no further action. App. 293-295, 306, 307, 322-325.

Some Petitioners, in exchange for severance pay, signed a waiver of certain

obligations against Rhone-Poulenc. The waiver was subject to an exception "as provided under the terms of" the severance pay agreement. At Petitioners' insistence, a provision was included in the severance pay agreement concerning the effect of qualifying at the organic plant. Qualifying was required if Petitioners exercised their transfer rights. It was Petitioners' intention to not surrender their transfer rights by accepting severance pay as reflected by the provision inserted into the severance pay agreement. App. 65, 305, 306, 314, 332, 333, 336, 337.

The Union Constitution (App. 366-404) provides as follows:

1. It is "a contract between the member, his Local Union, the International Union and every other member therein". The "organization shall be known as the International Union of Operating Engineers". One of its purposes is to assist "Local Unions

in negotiating collective bargaining agreements". Copies of all Collective Bargaining Agreements and modifications thereof "shall be filed with the General President immediately after execution".

2. The International Union has the power to "issue charters for Local Unions", "suspend and revoke any of said charters", "supervise the operation of Local Unions", "appoint supervisors and receivers when necessary", "prefer charges against Local Unions", "order trials with authority to discipline those affected", "adopt as part of the Constitution a procedure for the government and regulation of Local Unions", "provide for the general welfare of the organization and its members", "take all steps necessary to protect the interest of the organization", and "all other rights, powers, privileges and immunities not herein specifically denied".

3. The International Union, through its General President, is empowered to interpret the Constitution "and decide questions of law arising thereunder" [Article VI(2)] and has the "power to require Local Unions...and members to comply with this Constitution and any lawful rulings or orders of the International Union" [Article VI(3)].

4. The International Union, through its General President, for the purpose of "assuring the performance of collective bargaining agreements or other duties of a bargaining representative" has "full power to suspend or remove such Local Officers, suspend or revoke charters of such Local Unions or place such Local Unions and their officers and members under International Supervision" [Article VI(3)].

5. The General President "shall be strictly accountable and responsible for the faithful performance of his duties and

shall administer and enforce every law, rule, regulation and requirement of the Constitution, Ritual and Obligation" [Article VI(5)].

6. Collective Bargaining Agreements and modifications thereof "shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected" [Article XXIV(11)(e)]. App. 74, 75.

**REASONS FOR GRANTING PETITION**

1. The decision of the Sixth Circuit was limited to the arbitrary conduct standard and did not consider the lack of good faith or the failure to treat all members equally as required by Vaca v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842, 850 (1967); Air Line Pilots Association, International v. O'Neill, 499 U.S. _____, 111 S.Ct. 1127, 1132, 1134, 1135 (ns. 6 and 6),

113 L.Ed.2d 51 (1991). Vaca sets a three part standard for determining whether a Union violates its duty of fair representation. It must (1) treat all members equally; (2) act with good faith and honesty; and (3) avoid arbitrary conduct. The Sixth Circuit only referred to the arbitrary standard and did not refer to the standards for equal treatment or good faith and honesty.

The District Court, on the summary judgment motions, held there had been a "complete sellout" by the Local Union and that there was substantial evidence (Union's letter of July 16, 1991) that the Union did not pursue a grievance on behalf of Plaintiffs because of its duty to the ICI members.[5] App. 87-93.

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[5]Appellants' Brief in the Sixth Circuit clearly detailed the numerous acts of the Union that constituted breaches of its duty of fair representation. (App.431-517.) The Sixth Circuit's conclusion that one of the acts involving the Local Union and ICI was not raised until Appellants' Reply Brief (App. 518-561), is not consistent with the issues, facts and argument included in Appellants' Brief.

At the trial, the District Court held that the Rhone-Poulenc contract was unenforceable because of impossibility. The District Court indicated that since a hybrid § 301 action was involved, it was not necessary to make findings of the Union's breach of its duty of fair representation.[6] App. 128-165.

2. The decision of the Sixth Circuit, construing the arbitrary standard of the O'Neill decision, is in conflict with Lewis v. Tuscan Dairy Farms, Inc., 25 F.3rd 1138, 1142, 1143, 1145 (2nd Cir. 1994) and Aquinaga v. United Food and Comm. Workers Int'l Union, 993 F.2d 1463, 1470, 1472 (10th Cir. 1993), cert. den., 114 S.Ct. 880 (1994). The Lewis decision holds that the Union breached its duty of fair representation under

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[6]The Sixth Circuit rejected the impossibility argument but held that the Union had not violated its duty of fair representation. The Sixth Circuit ignored that the Union had stated that a reason for the failure to pursue the grievance was its duty to the ICI employees. The impossibility defense was clearly without merit. Restatement, Second, Contracts, Section 266; McCalden v. California Library Ass'n, 919 F.2d 538, 543 (9th Cir. 1990) (955 F.2d 1214, 1219).

the O'Neill standard where a Union misrepresented to employees their rights under an agreement and failed to submit, as required by the bylaws, a secret agreement with the employer to the employees for approval and ratification.

3. The decision of the Sixth Circuit is contrary to Steele v. L & N Railroad Co., 323 U.S. 192, 202, 203, 207, 65 S.Ct. 226, 232-234, 89 L.Ed. 173 (1944). The crux of the Sixth Circuit's decision is that Petitioners' rights were destroyed when ICI executed the June, 1991, contract with its own employees. In Steele, it was held an employer may not claim the benefit of a contract which the Union is not authorized to make. See also, Brotherhood of Locomotive Firemen, etc. v. Mitchell, 190 F.2d 308, 312, 313 (5th Cir. 1951).

In Steele and Mitchell, the Union represented both nonmembers and members

and discriminated in favor of members. "Power to act for" involves a duty to act in the employees' interest and behalf. Failure to inform or give employees it represents an opportunity to be heard, coupled with hostility and disloyalty to deprive Plaintiff of employment "in order to create a monopoly of employment" for the favored bargaining unit, should not be tolerated in a Union. Steele v. L & N Railroad Co., supra, 65 S.Ct. at 228-230, 232, 233.

All of the Respondents must have surmised that their best hope of escaping their clear legal obligations was to let ICI agree with its own employees to delete the 1982 Cross-Bumping Agreement. After all, ICI would be making its agreement with its employees who would be displaced by Petitioners.[7]

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[7]Exactly what the Union, both the International and Local 912, did here should be examined. It had a conflict of interest and for its own interest, it favored less senior employees. This violated the very

Respondents should not be permitted to retain the benefits received from inducing the Union to breach its contractual and trust obligations to Petitioners. Steele v. L & N Railroad Co., supra.; Brotherhood of Locomotive Firemen, etc. v. Mitchell, supra; Restatement, Second, Contracts, Sections 193, 194; Restatement, Second, Trusts, Section 170.

4. The Sixth Circuit decision is not only contrary to Wooddell v. International Bd. of Elec. Workers, 502 U.S. _____, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991), but also makes Wooddell meaningless. The Wooddell case involved the enforcement of contract rights similar to the contract claims involved herein. Wooddell, supra, 112 S.Ct. at 499.

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cornerstone of the Union movement, which is seniority. Indeed, in Humphrey v. Moore, 375 U.S. 335, 84 S. Ct. 363, 11 L.Ed.2d 370 (1964), the Supreme Court approved the Union's decision when it favored the most senior employees. The Court emphasized that this was the accepted and standard procedure. Here, the Union, acting to protect itself from a conflict of interest situation, favored the least senior employees. Humphrey v. Moore, supra, 375 U.S. at 349, 84 S.Ct. at 372, 11 L.Ed.2d at 382; (App 86-90).

Petitioners paid their dues for years in exchange for the Union providing the services covered by Articles VI(2), (3), (5) and XXIV(11)(e) of the Constitution and the Union (International and Local) failed to provide those services.[8]

The Union's interpretation of the contract is not binding on the Court. TCP Industries, Inc. v. Uniroyal, Inc., 661 F.2d 542, 549 (6th Cir. 1981); Local 783 v. General Electric Co., 471 F.2d 751, 756-758 (6th Cir.

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[8]Article VI(3) indicates a broad range of powers available to the International Union, including the ultimate of trusteeship. At the trial, Petitioners stated that a trusteeship was not necessary but that the International Union had a broad range of powers to correct the deficiencies involved. (App. 414-430.) Both the Sixth Circuit and the District Court construed this statement as a waiver of any rights under Article VI(3). The broad language of Article VI(3) and the statements of counsel in the trial transcript show there was no waiver. (App. 414-430, 547, 548.) The Sixth Circuit also indicates in a footnote, which appears to contradict the succeeding paragraph of the opinion, that Plaintiffs completely failed to pursue below a claim under Article VI(5). The Pre-Trial Order and the trial transcript show that Petitioners expressly claimed and argued that the Union violated Article VI(5). (App. 416, 417.) In the Pre-Trial Order, Petitioners specifically stated they were claiming that "the International Union breached its contractual obligations to Plaintiffs under Section VI(2), (3) and (5) and XXIV(11)(e) of the IUOE Constitution". (App. 179, 180, 547, 208-211.

1973), cert. den., 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55, and it is certainly true, where as here, the Union urges an unreasonable interpretation of its constitution. Reich v. Intern. All. of Theatrical Stage Emp., 32 F.3rd 512, 515, 516 (11th Cir. September 116, 1994).[9]

5. This case presents important issues of the responsibility of an International Union. Here, we have a standard Union Constitution where the Union promises to provide the essential services required of a Union. The International Union is a principal and party to the constitutional contract.[10] In

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[9]The Sixth Circuit cites Maher v. International Bhd. of Elec. Workers, 15 F.3rd 711, 714 (7th Cir. 1994), to indicate it must defer to the Union's interpretation if it is not unreasonable. However, the Maher case emphasized that this difference was only required where the interpretation did "not conflict with the plain meaning of any provision of the constitution", supra, 15 F.3rd at 714. Here, the Union's interpretation is directly contrary to the express language of the Constitution.

[10]The International Union here was a principal to the contract. However, the Sixth Circuit referred to agency theories and cited Moore v. Local Union 569 of Int'l Bhd. of Elec. Workers, 989 F.2d 1534 (9th Cir. 1993), cert. den., 114 S.Ct. 1066 (1994) and Shimman v.

addition to its liability as a principal, there is overwhelming documentary and other evidence showing the International Union's full participation in and prior knowledge of the Local Union's improper actions.

The principal assets of the Union Organization are held by the International Union. The Local Union is financially irresponsible. It has no significant assets. It carries no liability insurance. The International Union directs and controls the Local Union. Basically, the International Union uses the Local Union as a shield to protect its wealth from valid claims. App. 483, 484, 505-507.

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Frank, 625 F.2d 80 (6th Cir. 1980). Both of these cases involved tort-type claims as contrasted with the contract claims involved here. The Union relies upon Brenner v. Local 514 United Brotherhood of Carpenters, 927 F.2d 1283 (3rd Cir. 1991), which also involved claims primarily in the nature of tort. Brenner was decided on April 18, 1991, whereas Wooddell was argued on October 16, 1991, and decided on December 4, 1991, so the Brenner Court did not have the advantage of the Supreme Court's ruling in Wooddell at the time of its decision.

6. The decision of the Sixth Circuit failed to conform with the standards for review of a dismissal by summary judgment or by grant of judgment as a matter of law contrary to Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). The Sixth Circuit decision usurped the province of the jury in resolving ambiguities, inferences, factual disputes and weight to be given facts.

a. Conspiracy of Respondents. The declaratory judgment action was a sham. None of the parties to the declaratory judgment action filed a motion to dismiss or for summary judgment. Instead, they simply waited eight months until ICI, with the Local Union, could remove the Cross-Bumping Agreement from the Collective Bargaining Agreement for the organic plant. The layoffs, which had been scheduled for February of 1991, were delayed by Rhone-

Poulenc until immediately after Local Union 912 and ICI executed the new contract in June of 1991. Throughout this delay, Local Union 912 continually represented to Plaintiffs, with full knowledge that such representations were false, that the actions of the ICI bargaining unit could not affect Plaintiffs' rights.[11]

Tennessee uniformly recognizes the tort of conspiracy. Nashville Memorial Hospital, Inc. v. Binkley, 534 S.W.2d 318, 321 (Tenn. 1976); Hayes v. Schweikart's Upholstering Co., 402 S.W.2d 472 (Tenn. App. 1966 - only necessary to show a working in harmony to promote a common purpose); Franklin v. Green, 342 S.W.2d 233, 236 (Tenn. App.

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[11]The Sixth Circuit states there was no proof of malice. The Union's own correspondence shows that in the summer of 1990, it was well aware that Petitioners' rights would be affected. Yet, it continually falsely represented to Petitioners that their rights would not be affected. It is difficult to conceive of more blatant malice and hostility. Merely because Union officials smiled at Petitioners while they made such false representations to them does not relieve the malice and hostility of the admitted acts.

1960). See also, Allen v. Allied Plant of Nashville, 881 F.2d 291 (6th Cir. 1989).

b. Futility of pursuing grievance. The District Court held "[t]he contention of the R-P defendants that merely permitting the Plaintiffs to transfer to the organic plant satisfies their obligations is fanciful".[12] The District Court further stated that "[The] Cross-Bumping Agreement unambiguously provides that senior employees who are laid off at the furnace plant may transfer to the organic plant" and further stated that "contracts are to be kept".[13]

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[12]Petitioners did not "request" their transfer rights. Instead, they sent a formal "Notice of Intent" to exercise their transfer rights under the Cross-Bumping Agreement. (App. 251-254, 225-227, 562, 563.)

[13]The summary judgment opinion stated (App. 55-57):

> ...Granted, they may have difficulty forcing ICIA to give the Plaintiffs jobs at the organic plant, especially since the cross-bumping agreement has been deleted from the organic plant collective bargaining agreement, but the R-P defendants have only themselves to blame. Before their purchase of the Stauffer Chemical Company stock in 1987, ordinary due diligence should have made them aware

Indeed, even Rhone-Poulenc, in its internal memorandum dated September 13, 1988, recognized its potential liability.

c. If Rhone-Poulenc had contractual obligations to Petitioners, as found by the District Court and assumed by the Court of Appeals, certainly it was unreasonable to contend that pursuing a grievance for breach of such contract would be futile. Clearly this is true where Rhone-Poulenc had recognized that liability, if any, would fall on the company that laid off and could not force the cross-bumping rights on

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of the obligations of the corporation they were purchasing....Stauffer Chemical Company had promised the plaintiffs jobs at the organic plant, and when the R-P defendants bought Stauffer Chemical Company, they assumed that obligation. Prior to the purchase of Stauffer Chemical Company, the R-P defendants could have contracted with ICIA to reserve jobs at the organic plant or they could have contracted with Local 912 to surrender the plaintiffs' right to transfer. However, they did neither....The fact that ICIA has refused to accept the laid-off furnace plant employees does not relieve R-P Basic of its own independent promise to them. Pacta sunt servanda -- contracts are to be kept.

the opposite company. Indeed, the Union was fully aware of this position of Rhone-Poulenc at the time it refused to pursue the grievance. See also, App. 84-94.

d. Waiver signed by some Petitioners. The waiver contained a provision for a further exception "as provided under the terms of the memorandum of understanding". And the memorandum of understanding contained a clause inserted at the insistence of Petitioners to protect their rights under the Cross-Bumping Agreement. The inserted clause was meaningless if Petitioners intended to release their transfer rights.

Respectfully submitted,

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FILED JUL 27 1995
LEONARD GREEN, CLERK

NOT FOR PUBLICATION

No. 94-5132

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ALBERT AKINS, et al.,

Plaintiffs-Appellants,

TONY BROCK, et al.,

Plaintiffs,

v.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

ZENECA, INC.; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS CO,; STAUFFER CHEMICAL CO.; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Defendants-Appellees.

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Before: **CONTIE, MILBURN and SILER**, Circuit Judges.

PER CURIAM. Plaintiff Albert Akins and 39 co-plaintiffs, all members of the Local 912

International Union of Operating Engineers ("Local 912") and former employees of Rhone-Poulenc, Inc. ("R-P"), challenge the district court's grant of summary judgment, Fed. R. Civ. P. 56(c), and/or judgment as a matter of law, Fed. R. Civ. P. 50, to Defendants R-P, Zeneca, Inc. (formerly ICI Americas Inc. and hereafter "ICIA"), the International Union of Operating Engineers ("IUOE"), and Local 912 on plaintiffs' claims under § 301 of the Labor Management Relations Act and state law. For the reasons stated herein, we affirm the decision of the district court.

I.

As determined by the district court, the following facts are not in dispute:

Stauffer Chemical Company owned and operated two chemical plants in Mt. Pleasant, Tennessee. One, which is commonly called the "furnace plant," produced phosphorous. The other, which is commonly called the "organic

plant," produced herbicides and pesticides. Workers at both plants were represented by Local 912. These workers constituted a single collective bargaining unit with one common seniority list. One collective bargaining agreement ("CBA") governed the terms of employment for both plants.

In 1982, Stauffer proposed splitting the single collective bargaining unit into two separate units. Local 912 strongly objected to the proposal. However, after negotiations, the parties reached an agreement. Local 912 consented to divide the furnace plant and the organic plant employees into separate bargaining units, provided that Stauffer would permit workers at each plant to "cross-bump" to the other plant. This meant in the event of layoff at one plant, a senior employee from that plant could transfer to the other plant and displace a junior employee. The parties memorialized their bargain in a memorandum of

agreement, commonly referred to as the "cross-bumping agreement."

At roughly the same time that they executed the cross-bumping agreement, Local 912 and Stauffer entered into two new CBAs: one for the furnace plant and the other for the organic plant. Each CBA provided that the cross-bumping agreement "shall be considered as supplemental to the [CBA] between the parties ... and shall remain in full force and effect during the period of such [CBA] unless modified by the parties in writing." These CBAs remained in effect for three years.

In 1985, Local 912 and Stauffer negotiated new three-year CBAs for the two plants, each providing that the cross-bumping agreement was supplemental and that it would remain in effect for the duration of the current CBAs. In July 1987, prior to the expiration of the 1985 CBAs, various corporate affiliates of a multinational corporation,

Imperial Chemical Industries, P.L.C., purchased Stauffer. One of these affiliates retained the organic plant and merged into defendant ICIA. The other affiliates operated Stauffer's other facilities for a short period before selling them to unrelated companies near the end of 1987. Defendant R-P purchased the furnace plant in December 1987.

Upon the expiration of the 1985 CBAs, each of the new owners negotiated its own CBA with Local 912. During the negotiations, ICIA and R-P Basic tried to persuade Local 912 to delete all references to the cross-bumping agreement. The union, however, refused. The 1988 CBAs for both companies stated that the cross-bumping was considered supplemental and that it would remain in effect for the duration of the CBAs.

In June 1990, R-P Basic announced that it was going to close the furnace plant and that layoffs were expected to begin in February

1991. Anticipating that the organic plant employees and ICIA would seek to rescind the cross-bumping agreement, Local 912's business manager, James Kincade, sought the advice of the IUOE. In a letter dated June 26, 1990, Kincade wrote to Frank Hanley, General President of the IUOE, and inquired whether Section XXIV(11)(e) of the IUOE Constitution, which requires that proposed modifications to CBAs be "approved by the membership affected," would permit the organic plant bargaining unit to rescind the cross-bumping agreement without the consent of the furnace plant bargaining unit. President Hanley's reply did not answer Kincade's question.

On October 16, 1990, pursuant to the advice of its local counsel, Local 912 f~led a declaratory judgment action in this Court against ICIA and R-P Basic, asking the district court to "declare whether employees from the R-P Furnace Plant have the right to

bump employees in the ICI[A] organic plant pursuant to the [cross-bumping] agreement." After commencement of the declaratory judgment action, R-P Basic indicated for the first time that the layoffs might be delayed. In fact, the first layoffs did not begin until July 1991. As the expiration of the organic plant CBA approached, the furnace plant employees became increasingly anxious that the organic plant employees would delete the cross-bumping agreement from their new CBA with ICIA. Nevertheless, Kincade assured them that nothing that ICIA might do could affect their right to transfer pursuant to the cross-bumping agreement.

On June 11, 1991, ICIA and Local 912 entered into a new CBA. As the furnace plant employees had feared, the parties deleted all references to the cross-bumping agreement. At a meeting with the furnace plant employees, Kincade informed them that he decided that

ICIA could affect their transfer rights. He also indicated that Local 912 had dismissed the declaratory judgment action as moot. Upset with this news, several of the plaintiffs wrote to Frank Hanley, General President of the IUOE, seeking advice. Hanley responded that the matter was purely local and did not concern the IUOE.

In August, 1991, subsequent to some layoffs, Kincade assisted in filing a grievance with R-P. R-P denied the grievance, insisting that it had fulfilled all of its obligations under the cross-bumping agreement. R-P then provided forms on which employees could request a job with ICIA and submitted the forms to ICIA. ICIA, however, returned the forms.

In November 1991, plaintiffs sued the defendants for violations of § 301 of the LMRA, 29 U.S.C. § 185; the union constitution; and state law. The district court granted

summary judgment in full to ICIA and in part to the remaining defendants, thereby disposing of plaintiffs' state law claims and a number of other theories. The case then proceeded to trial. After plaintiffs concluded their proof, the remaining defendants moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b).[1] The district court granted defendants' motion.

II.

This court reviews a grant of summary judgment de novo. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). All reasonable inferences must be made in favor of the non-moving party in determining whether a genuine issue of material fact exists. Kunz v. United Food

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[1]Defendant Stauffer was dismissed without objection and is not a party to this appeal.

Commercial Workers Local 876, 5 F.3d 1006, 1008-09 (6th Cir. 1993). Likewise, this court reviews a grant of judgment as a matter of law de novo. This court determines whether, after viewing the evidence in the light most favorable to the non-moving party, "there is a complete absence of pleading or proof on an issue or issues material to the cause of action or ... no controverted issues of fact upon which reasonable men could differ." Kitchen v. Chippewa Valley Schs., 825 F.2d 1004, 1015 (6th Cir. 1987). If so, judgment as a matter of law must be granted to the moving party.

**A) Plaintiffs' State Law Claims.**

Plaintiffs contend that: (1) R-P and ICIA induced the unions to "breach [their] contractual and trust obligations to plaintiffs"; and (2) defendants conspired to deprive plaintiffs of their "vested contractual rights." Tennessee courts

recognize both a common law and statutory cause of action for civil conspiracy. Both require proof of a "combination between two or more persons to accomplish by concert an unlawful purpose or to accomplish a purpose, not in itself unlawful, by unlawful means." Hardin v. Caldwell, 695 S.W.2d 189, 191 (Tenn. Ct. App. 1985). Further, both require plaintiffs to first prove the existence of an underlying tort. Forrester v. Stockstill, 869 S.W.2d 328, 330 (Tenn. 1994). Failure to do so precludes recovery for civil conspiracy. See id. ("if the [underlying] claim fails, then the claim for conspiracy must also fail, for '[i]t cannot be that a conspiracy to do a thing is actionable where the thing itself would not be."' (citing Felts v. Paradise, 158 S.W.2d 727, 729 (Tenn. 1942)).

To this end, plaintiffs argue that defendants tortiously interfered with certain contracts, a claim that requires plaintiffs to

establish that: (1) a legal contract existed; (2) the wrongdoer knew of the contract; (3) the wrongdoer intended to induce breach; (4) the wrongdoer acted with malice; (5) a breach occurred; (6) the wrongdoer caused the breach; and (7) damages resulted. Oak Ridge Precision Indus. Inc. v. First Tenn. Bank Nat'l Ass'n, 835 S.W.2d 25, 29 (Tenn. Ct. App. 1992). A party will not be held liable under this tort for interfering with a contract to which it was a party. Koehler v. Cummings, 380 F.Supp. 1294, 1313 (M.D. Tenn. 1971).

Plaintiffs cannot support their claim of tortious interference with contract, as Local 912 and R-P are parties to the contracts at issue and plaintiffs failed to prove that any defendant acted with actual malice. See Testerman v. Tragesser, 789 S.W.2d 553, 556-57 (Tenn. Ct. App. 1989)(failure to prove actual malice precludes a claim for tortious interference with contract). As the

underlying tort fails, plaintiffs' claim for civil conspiracy fails as a matter of law. The district court, therefore, properly dismissed plaintiffs' state law claims:

B) Plaintiffs' Hybrid § 301 Claim against R-P and Local 912.

Plaintiffs brought a hybrid § 301 cause of action against R-P and Local 912, contending that R-P breached its obligations under the 1988 CBA by failing to obtain jobs for the plaintiffs in the organic plant, and that Local 912 breached its duty of fair representation by failing to pursue a grievance against R-P. In order for an employee to recover in a hybrid § 301 suit against his employer or union, the employee must show *both* that his employer breached the CBA and that the union breached its duty of fair representation. Adcox v. Teledyne,Inc., 21 F.3d 1381, 1386 (6th Cir.), cert. denied, 115 S.Ct. 193 (1994); Kunz, 5 F.3d at 1009.

Failure to establish both precludes recovery against either party.

The district court granted R-P and Local 912 judgment on plaintiffs' hybrid § 301 claim, stating as its basis the following:

> Now the court has determined that, as a matter of law, the defense of impossibility, or what is sometimes called the Doctrine of Impracticability, governs the disposition of this first claim. In this case, as a result of the change of ownership of the two plants, it simply became impossible for Rhone Poulenc to compel another corporation to take its employees.

This ruling is erroneous. As of 1988, when R-P agreed to include by reference the 1982 cross-bumping agreement in the CBA, it knew it could not "perform"[2] under the contract, in the sense that R-P could not force ICIA, a separate corporation with which it had no

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[2]Upon reviewing the contracts at issue, we question whether R-P had any duty under the 1988 CBA or cross-bumping agreement to assist in plaintiffs' transfers to the ICIA plant. For purposes of argument, however, we will treat R-P as having such a duty.

contractual ties, to abide by the cross-bumping agreement. This knowledge precludes R-P's defense of impossibility.

This error does not require a reversal, however, as Local 912 did not violate its duty of fair representation by failing to pursue a grievance against R-P on behalf of plaintiffs. A union breaches its duty of fair representation when it engages in "arbitrary conduct." Vaca v. Sipes, 386 U.S. 171, 177 (1967). A union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." Air Line Pilots Ass'n. Int'l v. O'Neill, 499 U.S. 65, 67 (1991)(citations omitted); see also Adcox, 21 F.3d at 1387. Local 912's decision to not pursue a grievance against R-P was not arbitrary conduct, as it knew that any grievance would be futile; aside from being

able to supply the necessary forms for filing a request for employment with ICIA (which it did), R-P's "hands were tied." As Local 912 did not breach its duty of fair representation,[3] plaintiffs' hybrid § 301 claim against both R-P and Local 912 fails.[4]

**C) Plaintiffs' § 301 Claim against ICIA.**

In an effort to prove that ICIA breached its obligations to them, plaintiffs contend that their right to make a one-time transfer

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[3]While plaintiffs also pursued a separate fair representation claim against Local 912 based upon Local 912's conduct of negotiating the deletion of the cross-bumping agreement from the 1991 organic plant CBA without including plaintiffs in the vote, plaintiffs failed to raise this claim in their appellate brief. Instead, plaintiffs attempted to indirectly argue the issue in their reply brief. Given that "[i]ssues raised for the first time in a reply brief are not properly before this court," United States v. Perkins, 994 F.2d 1184, 1191 (6th Cir.)(citations omitted), cert. denied, 114 S.Ct. 279 (1993), we decline to consider the merits of this claim.

[4]Given our resolution of the hybrid § 301 claim, we find it unnecessary to determine the effect of the 1988 memorandum which R-P incorporated in both the 1988 and 1991 CBAs.

to the organic plant is a "vested" right that cannot be modified or abandoned by a later CBA.[5] This circuit recognizes "two basic ways" in which plaintiffs may prove that a right is vested. Cincinnati Typographical Union No. 3, Local 14519 v Gannett Satellite Info. Network, Inc., 17 F.3d 906, 910 (6th Cir. 1994). First, parties may be found to have intended a right to vest if the contract language or extrinsic evidence supports such a conclusion. Id (citations omitted). Second, a court will treat certain rights which the employee works to accumulate over time as vested, even without any evidence of such intent in the contract. The typical examples of this type are severance pay and vacation pay. Id. at

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[5]Plaintiffs also contend that Local 912's 1991 CBA with ICIA is invalid. Any such argument is not properly before this court, however, as this court lacks the jurisdiction under § 301 to decide the validity of CBAs. Adcox, 21 F.3d at 1386.

911. We find that this case implicates neither.

First, neither the language of the cross-bumping agreement[6] nor extrinsic evidence

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[6]The cross-bumping agreement provided:

> Local Union No. 912, International Union of Operating Engineers and Stauffer Chemical Company for its Phosphorus Products Plant (Furnace) and its Intermediate Agricultural Chemicals Plant (Organic), both located in Mt. Pleasant, Tennessee do hereby agree that:
>
> 1. Employees hired prior to September 11, 1982 may exercise layoff rights as described below with the exception of current furnace plant employees who do not have the seniority to displace current employees at the organic plant.
>
> 2. Employees shall first exhaust their rights under the layoff procedures described in the [CBA] covering the plant to which they are assigned.
>
> 3. Employees of either plant covered by this Memorandum of Agreement who are to be laid off from their plant may then displace junior employees in the other plant provided that:
>
> a. The employee displaced shall be the junior employee in the classification.
>
> b. The employee must qualify for such classification after a reasonable training period of fifteen (15) working days or less at the furnace plant. If the employee fails to qualify, he will not be allowed to make further choices of jobs but rather will be laid off.

indicates that the employees' right to transfer was intended to be vested. Rather, the 1982, 1985 and 1988 CBAs stated explicitly that the cross-bumping agreement was "supplemental to the Collective Bargaining Agreement between the parties ... and shall remain in full force and effect during the period of such Collective Bargaining Agreement unless modified by the parties in writing."

Second, plaintiffs offer this court no support for treating their right to transfer as the second type of vested right. While plaintiffs cite a number of cases, all are distinguishable from the present situation. In both Cincinnati Newspaper Guild v.

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4. Employees who elect to move from one plant to another will become an employee of the plant to which they have moved and will have no further rights to return to the other plant.

5. Employees who are given the opportunity to exercise their right under this Memorandum of Agreement and who decline to do so shall forfeit future rights under this Agreement.

Cincinnati Enquirer, Inc., 863 F.2d 439, 440 (6th Cir. 1988), and Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1121 (6th Cir. 1981), cert. denied, 456 U.S. 991 (1982), the contracts at issue contained either an automatic renewal term or a term indicating that the agreement was permanent until modification by both parties. Neither the CBAs nor the cross-bumping agreement of the present case contained such a term. Further, the cases involving pension and retiree benefits are unpersuasive, as the Supreme Court has explicitly held those rights to be vested. See, e.g., United Mine Workers of America Health & Retirement Funds v. Robinson, 455 U.S. 562, 575 n.14 (1982)(pension benefits); Weimer v. Kurz-Kasch, Inc., 773 F.2d 669, 672-73 (6th Cir. 1985)(retiree benefits). The dismissal of the § 301 claim against ICIA was therefore proper.

**D) The Validity of the Employee Releases.**

In exchange for releasing the company from most of its obligations to them, a number of the plaintiffs accepted severance pay from R-P in amounts depending, in part, on the length of their employment. The release explicitly stated:

> I hereby release the Company from any and all pending and future obligations and liabilities to me arising out of employment with the Company, except for any unemployment compensation or worker's compensation claims that I may make and except as provided under the terms of the Memorandum of Understanding.

(emphasis added). Based on this release, the district court dismissed all the claims against R-P made by those plaintiffs who signed a release. Plaintiffs challenge this decision, contending that the release is: (1) unconscionable and a product of overreaching by R-P; (2) void for want of consideration since no additional amount was paid to employees with potential transfer rights; and

(3) ambiguous, thereby requiring a jury determination.

We disagree. Plaintiffs offer this court no basis for finding unconscionability or overreaching. Further, the plaintiffs received severance pay in consideration of their release. In fact, the amount paid to the employee depended, in part, upon the length of their employment (i.e., seniority with the company), thereby implicitly taking into account plaintiffs' potential transfer rights. Finally, the language of the release is clear and unambiguous; it specifically informed the plaintiffs that they were waiving any and all claims against R-P except for workers compensation or unemployment compensation claims.

**E) Breach of the IUOE Constitution.**

Plaintiffs contend that Local 912 and IUOE, as one union, violated Article VI(2), (3), and (5) and Article XXIV(11)(e) of the

IUOE Constitution. While we agree that plaintiffs, as third-party beneficiaries of the IUOE Constitution, may sue to enforce the provisions of that constitution, see Wooddell v. International Bhd. of Elec. Workers, 502 U.S. 93, 98-99 (1991), Local 912 and IUOE are separate entities and should be treated as such.[7] For this reason, we will consider the claims against each union separately.

1) Local 912.

Article XXIV(11)(e) of the Union Constitution provides:

> Proposed collective bargaining agreements and modifications

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[7]"[W]ithout evidence that [IUOE] instigated, supported, ratified or encouraged the Local's activities or that the Local acted pursuant to its agreement with the International, there [is] no agency relationship as a matter of law." Moore v. Local Union 569 of Int'l Bhd. of Elec. Workers, 989 F.2d 1534, 1543 (9th Cir. 1993), cert denied, 114 S.Ct. 1066 (1994). While plaintiffs use the words "full participant" and "authorized," they offer this court no proof of such, and, therefore, have failed to establish an agency relationship. See Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980).

> thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership.

Plaintiffs contend that Local 912 violated this provision by failing to submit the 1991 organic plant CBA to a vote by the entire membership prior to accepting the contract.

We disagree. The membership of each unit elected its own negotiating committee, each having the authority pursuant to Article XXIV(11)(e) to approve agreements and modifications for their particular plant without submission to a vote of the entire membership. Hence, just as the R-P bargaining

committee alone voted on CBA agreements for R-P, the ICIA bargaining committee had the authority to separately vote on the 1991 CBA with ICIA. Local 912 did not violate the IUOE Constitution.

2) IUOE.

Plaintiffs contend that IUOE breached Article VI(2), which provides that the General President "shall ... be empowered to interpret the provisions of the Constitution and decide questions of law arising thereunder," when General President Hanley, in response to Kincade's letter requesting advice regarding Article XXIV(11)(e), stated that Article XXIV(11)(e) only applied to proposed modifications of a CBA. Plaintiffs characterize this response as inappropriate and nonsensical.

Given that we "must defer to a union's interpretation of its own constitution so long as the interpretation is not unreasonable,"

Maher v. International Bhd. of Elec. Workers, 15 F.3d 711, 714 (7th Cir. 1994) (citations omitted), we find that plaintiffs have not established that IUOE breached Article VI section 2. While Hanley's response was non-responsive to the question asked, it was not incorrect and, therefore, not unreasonable. Further, Hanley cannot be said to have breached the constitution, as nothing in section 2 obligated Hanley to interpret the constitution on demand. Rather, as Article VI(S) explicitly states, the General President "shall be vested with unlimited discretion in the application and administration of his powers and duties."

Next, plaintiffs claim that IUOE violated Article VI(3), which gives the General President the authority to provide "international supervision" in the form of a trusteeship in the event of a local's misconduct, when Hanley declined to intervene

in the dispute between plaintiffs and Local 912. The district court determined that plaintiffs waived this claim during plaintiffs' argument on this issue, and we agree.[8] Further, even if the argument was properly before this court, it would fail, as Hanley's response was not unreasonable.

Finally, plaintiffs claim that the IUOE breached its duty of fair representation as embodied in Article VI(5) of the IUOE constitution. Contrary to plaintiffs' position, however, a union's duty of fair representation does not arise from the provisions of a union's constitution, but from the unions' exclusive authority under the NLRA to represent all employees in a bargaining unit. Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 563 (1990).

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[8]Plaintiffs also contend that IUOE violated Article VI, section (5). Plaintiffs completely failed to pursue this claim below, however, and we consider it waived.

Local 912, not IUOE, is the exclusive bargaining representative of plaintiffs and, therefore, Local 912 alone owes plaintiffs a duty of fair representation.

**F) Exclusion of the Internal Memorandum from Evidence.**

Plaintiffs challenge the district court's exclusion from evidence of an internal memorandum which was written by an employee of R-P and authenticated by stipulation of the parties. While we review evidentiary rulings for an abuse of discretion, reversal is appropriate only when we find that such abuse of discretion "has caused more than harmless error. " Cooley v. Carmine Cinemas, Inc., 25 F.3d 1325, 1330 (6th Cir. 1994)(citations omitted).

The district court did not abuse its discretion in excluding the evidence in question. Plaintiffs attempted to introduce the document through a witness with no

personal knowledge of the documents or the contents contained therein. This clearly violates Fed. R. Evid. 602's mandate that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Second, any error was harmless. Plaintiffs intended to use the memorandum to show what R-P knew of its obligations under the cross-bumping agreement, information that would be relevant only to plaintiffs' conspiracy or hybrid § 301 claim. Given the problems inherent with both claims, we find that this evidence, even if admitted, would not have warranted a different result.

**AFFIRMED.**

CONTIE, J., concurring. I concur. In regard to issue IIB, I feel it is necessary to point out that the union was responsible for strongly encouraging the adoption of the cross-bumping agreement by R-P even though as the majority states, it knew that R-P's "hands would be tied" in an effort to enforce the agreement. The union then refused to pursue a grievance in order to enforce the agreement because it knew such an effort would be futile. I believe R-P and the union shared responsibility for the adoption of an unenforceable agreement in the event of separate ownership of the two plants and in these circumstances, R-P had a valid defense of impossibility. Therefore, I do not believe the district court was in error and would affirm on this basis.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

| | | |
|---|---|---|
| ALBERT AKINS, et al. | ) | |
| | ) | |
| v. | ) | No. 1-91-0134 |
| | ) | Judge Higgins |
| ICI AMERICAS INC., et al. | ) | |

**MEMORANDUM**

The Court has before it the joint motion (filed February 14, 1992; Docket Entry No. 51) of defendants Rhone-Poulenc, Inc. (R-P Inc.) and Rhone-Poulenc Basic Chemicals Company (R-P Basic) to dismiss or for summary judgment, the motion (filed September 19, 1992; Docket Entry No. 133) of defendant ICI Americas, Inc. (ICIA) for summary judgment,[1] the motion (filed September 19, 1992; Docket Entry No. 138) of defendant Local Union No. 912, International Union of Operating Engineers (Local 912) for summary judgment, and the motion (filed October 2, 1992; Docket Entry No. 149) of

[1]Defendant ICI Americas, Inc. changed its name to Zeneca, Inc. after it filed its motion for summary judgment. For the sake of clarity, the Court continues to refer to this defendant by its former name.

defendant International Union of Operating Engineers (IUOE) for summary judgment.

Also before the Court is the plaintiffs' request to try this action before a jury. See amended complaint (filed January 23, 1992; Docket Entry No. 30) at 10.

For the reasons set forth below, the motion of defendant ICIA shall be granted in full. The motions of the other defendants shall be granted in part and denied in part. The plaintiffs' jury demand shall be granted.

I.

This action is brought by sixty-eight chemical workers from Mt. Pleasant, Tennessee, some of whom have been laid off and some of whom are facing layoffs. In 1982, their former employer promised them that they could transfer to another plant if they were laid off at their own workplace. However, by the time layoffs were announced, the employer no longer owned the plant where the plaintiffs

worked or the other plant to which it had promised them the transfer. Thus, to get what they believed they are due, the plaintiffs have brought this action against their former employer, the corporations that bought the former employer's plants, and their labor union.

For many years, Stauffer Chemical Company owned and operated two chemical plants in Mt. Pleasant, Tennessee. One, which is commonly called the "furnace plant," produced phosphorous. The other, which is commonly called the "organic plant," produced herbicides and pesticides.

Workers at both plants were represented by Local 912. These workers constituted a single collective bargaining unit with one common seniority list. One collective bargaining agreement governed the terms of employment for both plants.

In 1982, Stauffer Chemical Company proposed splitting the single collective bargaining unit into two separate units. Local 912 strongly objected t the proposal. However, after negotiations, the parties reached an agreement, Local 912 consented to divide the furnace plant and the organic plant employees into separate bargaining units, provided that Stauffer Chemical Company would permit workers at one plant to "cross-bump" to the other plant. This meant that in the event of layoffs at one plant, a senior employee from that plant could transfer to the other plant and displace a junior employee. The parties memorialized their bargain in a memorandum of agreement, commonly referred to as the "cross-bumping agreement."[2]

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[2]The cross-bumping agreement, which lies at the core of this case, is set forth below in its entirety:

Memorandum of Agreement

Local Union No. 912, International Union of Operating Engineers and Stauffer Chemical Company for its Phosphorus Products Plant (Furnace) and its

At roughly the same time that they

Intermediate Agricultural Chemicals Plant (Organic), both located at Mt. Pleasant, Tennessee do hereby agree that:

1. Employees hired prior to September 11, 1982 may exercise layoff rights as described below with the exception of current furnace plant employees who do not have the seniority to displace current employees at the organic plant.

2. Employees shall first exhaust their rights under the layoff procedures described in the collective bargaining agreement covering the plant to which they are assigned.

3. Employees of either plant covered by this Memorandum of Agreement who are to be laid off from their plant may then displace junior employees in the other plant provided that:

a. the employee displaced shall be the junior employee in the classification.

b. The employee must qualify for such classification after a reasonable training period at the organic plant or a period of fifteen (15) working days or less at the furnace plant. If the employee fails to qualify, he will not be allowed to make further choices of jobs but rather will be laid off.

4. Employees who elect to move from one plant to another will become an employee of the plant to which they have moved and will have no further rights to return to the other plant.

5. Employees who are given the opportunity to exercise their rights under this Memorandum of Agreement and who decline to do so shall forfeit future rights under this Agreement. (Ex. P-28.)

executed the cross-bumping agreement, Local 912 and Stauffer Chemical Company entered into two new collective bargaining agreements: one for the furnace plant and the other for the organic plant.[3] Each collective bargaining agreement provided that the cross-bumping agreement "shall be considered as supplemental to the Collective bargaining Agreement between the parties . . . and shall remain in full force and effect during the period of such Collective Bargaining Agreement unless modified by the parties in writing." Appendix (filed September 18, 1982; Docket Entry No. 136) to ICIA's motion for summary judgment at 74-75, 320. These collective bargaining agreements remained in effect for three years.

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[3]The dates of the cross-bumping agreement and the collective bargaining agreements are anomalous. The collective bargaining agreements, which are dated September 11, 1982, refer to the cross-bumping agreement as a memorandum of agreement dated September 13, 1982. In fact, the cross-bumping agreement does not bear any date.

In 1985, upon expiration of the 1982 collective bargaining agreements, Local 912 and Stauffer Chemical Company negotiated new three-year collective bargaining agreements for the two plants. Like their predecessors, the new collective bargaining agreements provided that the cross-bumping agreement was considered supplemental and that it would remain in effect for the duration of the current collective bargaining agreements.

In July 1987, prior to the expiration of the 1985 collective bargaining agreements, various corporate affiliates of a multinational corporation, Imperial Chemical Industries, P.L.C., purchased Stauffer Chemical Company. One of these affiliates retained the organic plant and merged into defendant ICIA. The other affiliates operated Stauffer's other facilities for a short period before selling them to unrelated companies near the end of 1987. Defendant R-P Inc.

purchased the furnace plant in December, 1987. R-P Inc. also acquired all of the stock of Stauffer Chemical Company sometime in 1987.[4]

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[4]The parties have stipulated that R-P Inc. purchased all of the Stauffer Chemical Company stock sometime during 1987. Agreed stipulations (filed November 9, 1992; Docket Entry No. 162) ¶¶ 41-42. The parties have stipulated further that Stauffer Chemical Company changed its name to "Stauffer Chemical Company Division of Rhone-Poulenc, Inc." in 1988 and that entity changed its name to "Rhone-Poulenc Basic Chemicals Company" in 1989. Id. at ¶¶ 43-44.

The R-P defendants contend that there is no longer an entity called Stauffer Chemical Company. R-P Inc. and R-P Basic's opposition (filed February; 18, 1992; Docket Entry No. 55) to application for default at 1. Nevertheless, the record is not entirely consistent with this contention.

On October 23, 1987, Stauffer Chemical Company applied to the Secretary of State of Tennessee for a certificate of withdrawal from Tennessee. In accordance with Tenn. Code Ann. Section 48-25-201(b), it is consented to service of process on the Secretary of State for actions arising while it was authorized to transact business in Tennessee, and it listed "ICI Americas Inc., . . . Wilmington, Delaware" as its forward address. See exhibit No. 1 to plaintiffs' response (filed January 13, 1992; Docket Entry No. 24) to motion to quash. It has never notified the Secretary of State that its address has changed, although Tenn. Code Ann. Section 48-25-201 requires it to do so.

On February 22, 1988, an entity called Stauffer Chemical Company Division of Rhone-Poulenc applied to the Secretary of State of Tennessee for a certificate of authority to transact business in Tennessee. On the application, it indicated that its date of incorporation was July 15, 1987. Exhibit No. 1 to plaintiffs' reply (filed February 18, 1992; Docket Entry No. 56) to opposition to application for default judgment. On October 25, 1989, this entity applied to the Secretary of State to amend its certificate to reflect its new name as "Rhone Poulenc Basic Chemicals Co." Again, it listed its date of incorporation as July 15, 1987. Id.

ICIA and R-P Basic, a subsidiary of R-P Inc., continued to operate the organic and the furnace plants under the terms of the collective bargaining agreements that Stauffer Chemical Company had negotiated in 1985. However, upon the expiration of those agreements in 1988, each of the new owners

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These facts indicate that Stauffer Chemical Company and R-P Basic are separate entities, the latter being incorporated on July 15, 1987. The plaintiffs have properly served process on defendant Stauffer Chemical Company by executing service of process on the Secretary of State of Tennessee in accordance with Tenn. Code Ann. Section 48-55-104. Unless defendant Stauffer Chemical Company answers the amended complaint within fifteen days of the entry of the order accompanying this memorandum, the Court will instruct the Clerk to do her duty and enter default in accordance with Federal Rule of Civil Procedure No. 55(a).

The Court also notes that on March 5, 1990, an entity called Stauffer Chemical Company, listing its address as "ICI Americas Inc. . . . Wilmington, Delaware" and its date of incorporation as July 14, 1987, applied to the Secretary of State for a certificate of authority to transact business in Tennessee. See exhibit No. 2 to plaintiff's response (filed January 13, 1992; Docket Entry No. 24) to motion to quash. Then, on March 13, 1990, the same entity filed an application of withdrawal. Id. Although the filing of the application for withdrawal only eight days after the first application suggests that the first application had been filed in error, the matter is perplexing. B.W. Bowman, the corporate secretary, signed both the application to transact business and the application to withdrawal on the same day, February 8, 1990. Thus, it appears that the documents were advertently filed to authorize an entity called Stauffer Chemical Company to transact business in Tennessee for a short period in early 1990.

negotiated its own collective bargaining agreement with Local 912.

During the negotiations, ICIA and R-P Basic tried to get Local 912 to agree to delete all references to the cross-bumping agreement. However, the union refused. The 1988 collective bargaining agreements for both companies, like the previous agreements negotiated by Stauffer Chemical Company, stated that the cross-bumping agreement was considered supplemental and that it would remain in effect for the duration of the collective bargaining agreements. Appendix (filled September 18, 1992; Docket Entry No. 136) to ICIA's motion for summary judgment at 219, 361. ICIA's collective bargaining agreement remained in effect until June 11, 1991. R-P Basic's collective bargaining agreement remained in effect until August 15, 1991. In addition, R-P Basic's agreement incorporated by reference a new memorandum of

agreement, dated October 13, 1988, which purportedly clarified the company's obligations with respect to the cross-bumping agreement.[5]

In June, 1990, R-P Basic announced that it was going to close the furnace plant and that layoffs were expected to begin in February, 1991. Workers at the organic plant, who feared being displaced by senior workers from the furnace plant, began to regard the cross-bumping agreement with disdain. Meanwhile, workers at the furnace plant were developing a newfound appreciation for the same agreement. Local 912 was caught in the middle.

Anticipating that the organic plant employees and ICIA would seek to rescind the

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[5]This memorandum of agreement stated: "The Company will have fulfilled all its obligations under the Collective Bargaining Agreement when its employees have been [laid] off under Article VII, Seniority, or when its employees have been [laid] off under the terms of the [cross-bumping agreement] as it pertains to I.C.I.[A.] (Organic Plant)." Appendix A filed February 14, 1992; Docket Entry No. 54) to motion for summary judgment of R-P Basic and R-P Inc., exhibit No. 1 at 5.

cross-bumping agreement, Local 912's business manager, James Kincaid, sought the advice of the international union. In a letter dated June 26, 1990, Mr. Kincaid wrote to Frank Hanley, General President of the IUOE, and explained his dilemma in great detail. Plaintiffs' exhibit No. 7 (filed March 13, 1992; Docket Entry No. 66). Specifically, he inquired whether Section XXIV(11)(e) of the IUOE constitution, which requires that proposed modifications to collective bargaining agreements be "approved by the membership affected," would permit the organic plant bargaining unit to rescind the cross-bumping agreement without the consent of the furnace plant bargaining unit. President Hanley's reply did not answer Mr. Kincade's question. Plaintiffs' exhibit No. 8 (filed March 13, 1992; Docket Entry No. 66). President Hanley merely stated that the union members' rights were already governed by the

cross-bumping agreement. Therefore, he concluded, Section XXIV(11)(e), which applied only to "proposed" modifications of collective bargaining agreements, was inapplicable.

On October 16, 1990, pursuant to the advice of its local counsel, Local 912 filed a declaratory judgment action in this Court against ICIA and RP-Basic. The complaint in that action asked this Court, in part, to "declare whether employees from the Rhone-Poulenc Furnace Plant have the right to bump employees in the ICI[A] organic plant pursuant to the [cross-bumping] agreement." Plaintiff's exhibit No. 36 (filed October 13, 1992; Docket Entry No. 160) ¶ 12.

After the commencement of the declaratory judgment action, R-P Basic indicated for the first time that the layoffs, which had been scheduled to begin in February, 1991, might be delayed. In fact, the first layoffs did not begin until July, 1991.

As the expiration of the organic plant collective bargaining agreement approached, the furnace plant employees became increasingly anxious that their colleagues at the organic plant would delete the cross-bumping agreement from their new collective bargaining agreement with ICIA. Nevertheless, Mr. Kincade, assured them that nothing that ICIA might do could affect their right to transfer pursuant to the cross-bumping agreement.

On June 1, 1991, ICIA and Local 912 entered into a new collective bargaining agreement. As the furnace plant employees had feared, the parties deleted all references to the cross-bumping agreement.

At the next meeting of the furnace plant bargaining unit, Mr. Kincade spoke about the effect of the new organic plant collective bargaining agreement. Mr. Kincaid told the furnace plant employees that, after discussing

the matter with Local 912's attorney, he had changed his mind about ICIA's ability to affect their transfer rights. He now believed that deleting the cross-bumping agreement from the new organic plant collective bargaining agreement had foreclosed their right to transfer to the organic plant. He also told them that Local 912 had dismissed the declaratory judgment action as moot.

Understandably, the furnace plant employees were displeased with Local 912. Mr. Kincade previously had told them that Local 912 could not affect their transfer rights through its negotiations on behalf of the organic plant bargaining unit. Now Mr. Kincade had reversed himself. Moreover, he asserted that Local 912 had just surrendered their transfer rights on the eve of layoffs at the furnace plant.

On July 10, 1991 several of the plaintiffs wrote directly to Frank Hanley,

General President of IUOE. Plaintiffs' exhibit No. 9 (filed March 13, 1992; Docket Entry No. 66). They explained the conflict of interest that had developed and concluded as follows: "We would appreciate anything you could do for us, as our union seems to be working against our best interest." President Hanley responded by letter dated August 5, 1991 that the matter was purely local and did not concern the IUOE. Plaintiffs' exhibit No. 44 (filed October 13, 1992; Docket Entry No. 160).

Layoffs at the furnace plant began in July, 1991. Pursuant to a severance agreement previously negotiated between Local 912 and R-

P Basic, many of the laid-off workers accepted severance pay and other severance benefits. As a precondition to receiving such benefits, each employee had to sign a waiver that released R-P Basic from all pending and future obligations to the employee. Appendix (filed September 18, 1992; Docket Entry No. 136) to ICIA's motion for summary judgment at 231.

In August, 1991, Mr. Kincade assisted some of the plaintiffs in filing a grievance with R-P Basic. Appendix A (filed February 14, 1992; Docket Entry No. 54) to motion for summary judgment of R-P Basic and R-P Inc., exhibit No. 5. The grievants demanded that they be transferred to the organic plant and that they be made whole for any losses they had sustained. R-P Basic denied the grievance, insisting that it had fulfilled all

of its obligations under the cross-bumping agreement by permitting its employees to transfer to ICIA. Id. R-P Basic maintained that it could not force ICIA to accept them. To facilitate the transfers, R-P Basic circulated a form on which laid-off employees could indicate whether they desired to transfer. The company eventually forwarded the forms to ICIA, but ICIA returned them. Plaintiffs' exhibit No. 47 (filed October 13, 1992; Docket Entry No. 160).

Some of the plaintiffs also attempted on their own to file a grievance at ICIA. However, ICIA refused to process it on the grounds that the grievants were not ICIA employees. Plaintiffs' exhibit No. 5 (filed October 13, 1992; Docket Entry No. 160).

Feeling betrayed by their union and the corporations that owned the two plants, the plaintiffs brought this action in November, 1991. They allege that the corporate

defendants have breached the cross-bumping agreement and their collective bargaining agreements in violation of Section 301 of the Labor Management Relations Act (LMRA), 19 U.S.C. § 185. The plaintiffs also allege that the union defendants violated LMRA Section 301 by breaching the union constitution and that they violated Section 101 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411. In addition, the plaintiffs allege that all of the defendants are liable under the laws of the State of Tennessee for tortiously interfering with the plaintiffs' contract rights and for conspiring to do the same.

The plaintiffs seek monetary, injunctive, and declaratory relieve.

Jurisdiction is based on 28 U.S.C. § 1331.

II.

Under Federal Rule of Civil Procedure 56 "[a] court may grant summary judgment only if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." Davidson & Jones Development Company v. Elmore Development Co., Inc., 921 F.2d 1343, 1349 (6th Cir. 1991). An issue of material fact is one which would enable a reasonable jury to find in favor of the non-moving party in accordance with the substantive law of the suit. See Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 248, 249, 252, 106 S.Ct. 2505, 2510, 2512, 91 L.Ed.2d 202, 211, 212, 214 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211. Furthermore, when considering a motion for summary judgment,

all "'inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion.'" Davidson & Jones Development, 921 F.2d at 1349 (quoting United States v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)).

However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to defeat a motion for summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff." Liberty Lobby, 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.[6] Moreover, once a motion for

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[6] See also City Communications, Inc. v. City of Detroit, 888 F.2d 1081, 1085 (6th Cir. 1989) ("'the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.'") (quoting Liberty Lobby, 477 U.S. at 247-48, 106 S.Ct. at 2510, 91 L.Ed.2d at 221; emphasis in original).

summary judgment has been made, "the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e)." Davidson & Jones Development, 921 F.2d at 1349. In other words, when a party makes a motion for summary judgment, it has "challenge[d] the opposing party to 'put up or shut up' on a critical issue. After being afforded sufficient time for discovery, as required by Federal Rule of Civil Procedure 56(f), if the respondent [does] not 'put up,' summary judgment is proper." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989). Further,

> [a] district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim. Rule 56 contemplates a limited marshalling of evidence by the nonmoving party sufficient to establish a genuine issue of material fact for trial.

InterRoyal Corporation v. Sponseller, 889 F.2d 108, 111 (6th Cir.), cert. denied, 494 U.S. 1091, 110 S.Ct. 1839, 108 L.Ed.2d 967 (1990).

**A. LMRA Section 301 Claims.**

Section 301 of the Labor Management Relations Act creates a cause of action for "violation[s] of contracts between employer and a labor organization representing employees . . . , or between any such labor organizations." 29 U.S.C. § 185(a).

In the instant action, the plaintiffs allege that the corporate and the union defendants violated Section 301 by breaching the cross-bumping agreement, as well as the various collective bargaining agreements that incorporated it, all of those agreements being "contracts between an employer and a labor organization representing employees." The plaintiffs further allege that the union defendants violated Section 301 by breaching the union constitution, which is a contract

"between . . . labor organizations." Below, the Court separately treats the claims against each defendant.

1. **R-P Basic and R-P Inc.**

The plaintiffs have come forward with sufficient evidence to defeat the R-P defendants' motion for summary judgment on the claim that they breached the cross-bumping agreement and the 1988 furnace plant collective bargaining agreement.[7] The cross-bumping agreement unambiguously provides that senior employees who are laid off at the furnace plant may transfer to the organic plant. The 1988 collective bargaining agreement, to which R-P Basic is a signatory, explicitly incorporates the cross-bumping agreement.

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[7]The plaintiffs also allege that the R-P defendants breached the 1982 and 1985 collective bargaining agreements. Those agreements are expired and superseded by the 1988 bargaining agreement. The plaintiffs' claims that the R-P defendants breached them in 1991 is meritless. Accordingly, the Court shall enter summary judgment for the defendants on those claims.

The contention of the R-P defendants that merely permitting the plaintiffs to transfer to the organic plant satisfies their obligations is fanciful. Granted, they may have difficulty forcing ICIA to give the plaintiffs jobs at the organic plant, especially since the cross-bumping agreement has been deleted from the organic plant collective bargaining agreement, but the R-P defendants have only themselves to blame. Before their purchase of the Stauffer Chemical Company stock in 1987, ordinary due diligence should have made them aware of the obligations of the corporation they were purchasing.[8] It is a basic principle of corporate law that "[i]n case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues

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[8]The R-P defendants readily admit that R-P Basic is the "successor in interest" to Stauffer Chemical Company. E.g., opposition (filed February 18, 1991; Docket Entry No. 55) by R-P Basic and R-P Inc. to application of default at 1.

in existence, the latter corporation is liable for the debts, contracts and torts of the former." 15 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 7121 (perm ed. rev. vol. 1990). Stauffer Chemical Company had promised the plaintiffs jobs at the organic plant, and when the R-P defendants bought Stauffer Chemical Company, they assumed that obligation. Prior to the purchase of Stauffer Chemical Company, the R-P defendants could have contracted with ICIA to reserve jobs at the organic plant or they could have contracted with Local 912 to surrender the plaintiffs' rights to transfer. However, they did neither. Moreover, in 1988 R-P Basic explicitly adopted the cross-bumping agreement by incorporating it into its own collective bargaining agreements for the furnace plant. The fact that ICIA has refused to accept the laid-off furnace plant employees does not relieve R-P Basic of its own

independent promise to them. Pacta sunt servanda -- contracts are to be kept. See generally Restatement (Second) of Contracts, Introductory Note to ch. 11; John D. Calamari & Joseph M. Perillo, Contracts 536 (3d ed. 1987) (Even though an equity court will not grant specific performance when a promise is impossible to perform, the breaching party is still liable in damages.).

Nor does the October 13, 1988, memorandum of agreement[9] clearly abrogate the transfer rights of the plaintiffs. It merely says that R-P Basic may lay off employees by seniority "or" under the terms of the cross-bumping agreement. However, it is ambiguous as to whether employees who are covered by the cross-bumping agreement may be laid off by seniority. A logical reading is that employees who are covered by the cross-bumping agreement are to be laid off in accordance

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[9] Supra note 5.

with that agreement (in other words, transferred to the organic plant) and that other employees are to be laid off by seniority. Furthermore, the plaintiffs have submitted ample extrinsic evidence suggesting that this interpretation is correct.[10]

Even though the R-P defendants have not overcome, at this stage, the plaintiffs' evidence showing that they breached the cross-bumping agreement and the 1988 collective bargaining agreement, they would still be entitled to summary judgment if they could demonstrate that Local 912 did not breach its "duty of fair representation" in refusing to

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[10]The plaintiffs' evidence includes the affidavit of a member of the employees' 1988 negotiating committee and an alternative version of the October 13, 1988, memorandum of agreement that clearly sets out the interpretation urged by the R-P defendants but was rejected by the employee bargaining unit. Plaintiffs' exhibit Nos. 1 & 3 (filed March 13, 1992; Docket Entry No. 66).

The R-P defendants argue that these documents are inadmissible parole evidence. They are not. The parole evidence rule does not forbid the admission of extrinsic evidence as an aid to interpretation of an ambiguous contract term. See generally John D. Calamari & Joseph M. Perillo, Contracts §§ 3-9 to 3-15 (1987).

pursue their grievance against R-P Basic. See DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 164 n.14, 103 S.Ct. 2281, 2290, n.14, 76 L.Ed.2d 476, 489 n.14 (1983). The 1988 collective bargaining agreement between R-P Basic and Local 912 provides an elaborate procedure for the resolution of disputes. Appendix A (filed February 14, 1992; Docket Entry No. 54) to motion for summary judgment of R-P Basic and R-P Inc., exhibit No. 2, Article IX. The Supreme Court has instructed that when collective bargaining agreements contain this sort of internal dispute resolution mechanism, employees may not "sidestep" it by bringing a Section 301 action against their employer. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563, 96 S.Ct. 1048, 1055, 47 L.Ed.2d 231, 241 (1976). Rather, an aggrieved employee must first exhaust whatever dispute resolution procedures are established by the collective

bargaining agreement. Vaca v. Sipes, 386 U.S. 171, 184, 87 S.Ct. 903, 914, 17 L.Ed.2d 842, 854 (1967). When those procedures provide that the employee's union has the exclusive authority to process grievances, the employee must defer to this union's efforts on his behalf. Id. Unless the employee demonstrates that his union breached its duty of fair representation in handling his grievance, the employee may not bring a Section 301 action against his employer. Id. at 186, 87 S.Ct. at 914-15, 17 L.Ed.2d at 855. The employee must prove that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement before the employee may recover from either of them. Hines, 424 U.S. at 570-571, 96 S.Ct. at 1059, 47 L.Ed.2d at 245; Bagsby v. Lewis Bros., 820 F.2d 799, 801 (6th Cir. 1987). Accordingly, this form of action is often called a "hybrid Section 301/duty of fair representation

claim."[11] DelCostello, 462 U.S. at 165, 103 S.Ct. at 2291, 76 L.Ed.2d at 489.

In Part II.B.1 of this memorandum the Court explains why Local 912 is not entitled to summary judgment on the claim that it breached its duty of fair representation in refusing to process the plaintiff's grievance against R-P Basic. Accordingly, R-P Basic may not escape liability from the hybrid claim against it on that basis.

Furthermore, the R-P defendants' argument that the plaintiffs failed to exhaust internal union procedures to force Local 912 to process their grievance, see Willets v. Ford Motor Company, 583 F.2d 852, 855-56 (6th Cir. 1978), is adequately rebutted by the plaintiffs' evidence. This evidence includes an affidavit

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[11]Some of the defendants have asserted that the plaintiffs' hybrid claim is barred by the six-month statute of limitations. See DelCostello, 462 U.S. 151, 155, 103 S.Ct. 2281, 2285, 76 L.Ed.2d 476, 483. The Court disagrees. No cause of action accrued before the first plaintiffs were laid off in July, 1991. The complaint was timely filed on November 14, 1991.

of one of the plaintiffs in which he avers that there are no such procedures. Plaintiffs' exhibit No. 1 (filed March 13, 1992; Docket Entry No. 66) at 3-4. See also plaintiffs; exhibit No. 3 (letter from plaintiffs' counsel to Local 912 regarding existence of internal union procedures).

Nevertheless, the Court finds that those plaintiffs who accepted severance pay from R-P Basic in exchange for releasing the company from all obligations to them are bound by their agreement.[12] Each of them received a

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[12]Defendant ICIA alleges that twenty-seven of the plaintiffs signed the release in exchange for severance pay. Memorandum (filed September 18, 1992; Docket Entry No. 134) of the defendant ICIA in support of motion for summary judgment at 65 n.29. Defendant R-P Basic only alleges that twenty-five of the plaintiffs signed releases. memorandum (filed February 14, 1992; Docket Entry No. 53) of defendants R-P Basic and R-P Inc. in support of motion for summary judgment at 27. The record contains copies of twenty-four releases signed by individual plaintiffs. Appendix (filed September 18, 1992; Docket Entry No. 146) to defendant ICIA's motion for summary judgment at 606-30.

The twenty-four plaintiffs whose signed releases are part of the record are the following: Gene Barker, Tony Brock, William T. Colvert, Robert Gilliam, Danny S. Green, Jerry Hicks, Walter Hudspeth, Mark Hunt, Nadine James, Richard W. James Jr., William L. Jarrett, Terry Jennings, Raymond Neely, Terrance Nevette, Ralph Osborn, David Paley, Michael Pilkinton, Charles S. Robinson Jr.,

severance package that included $6,910.40 to $9,180.00 in cash, depending on the length of employment, and other benefits. In exchange for this severance package, each employee signed a release that was very clear. It said:

> I hereby release the Company from any and all pending and future obligations and liabilities to me arising out of employment with the Company, except for any unemployment compensation or worker's compensation claims that I may make and except as provided under the terms of the Memorandum of Understanding.

Appendix (filed September 18, 1992; Docket Entry No. 136) to ICIA's motion for summary judgment at 606-30. The "Memorandum of Understanding" referred to in the release is the severance agreement negotiated by Local 912 and R-P Basic. Id. at 228. It sets out the various severance benefits and the terms for receiving them, including the requirement

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James R. Scott Jr., Joseph Shyes, Sharon Liles Steiner, William T. Thomason, Robert J. Tidwell, and Geneva Wiggins. Id.

that each employee release R-P Basic from "any and all pending and future obligations and liabilities" as a condition to receiving the severance package. Id. at 229.

Those plaintiffs who accepted the severance package struck a deal with R-P Basic. None has offered to return the severance benefits he received. Now, it is too late to renege. See Cumberland & Ohio Co. v. First Am. Nat. Bank, 936 F.2d 846, 850 (6th Cir. 1991) (Releasor who retains consideration may not later avoid terms of release.).

Nor is there any evidence in the record that any of the plaintiffs who signed the release did not do so knowingly, willingly, or voluntarily. It is difficult to imagine any release having a clearer meaning than the one quoted above. The plaintiffs have attempted to inject some confusion into this otherwise unambiguous release by pointing to a sentence

in the severance agreement that states: "Qualifying for a position at the Organic Plant will make an individual ineligible under this [severance agreement] whereas failure to qualify for a position at the Organic Plant will not make an individual ineligible." Appendix (filed September 18, 1992; Docket Entry No. 136) to ICIA's motion for summary judgment at 230. The plaintiffs argue that this sentence indicates that the release did not cover R-P Basic's obligation to transfer the plaintiffs to the organic plant. The Court, however, concludes that there is no merit to this argument. The release clearly states that it covers "any and all" obligations by R-P Basic. The sentence to which the plaintiffs have referred is not to the contrary. It merely provides that any laid-off furnace plant employee who succeeded in transferring to the organic plant would not be eligible for the severance benefits. The

release did not affect the plaintiffs' claims against ICIA. At the time the plaintiffs signed the release, and even today, they continued to believe that the cross-bumping agreement obligated ICIA to provide them with jobs at the organic plant. It is easily understood that Local 912 and R-P Basic agreed that those employees who succeeded in transferring should not receive the same severance benefits as their colleagues who were put out of work by the layoffs.

The plaintiffs' other arguments -- that the releases we procured by fraud and that the consideration was inadequate -- are also without merit. The "fraud" alleged by the plaintiffs is that R-P Basic told the plaintiffs, before it asked them to sign the releases, that it was not obligated to provide transfers under the cross-bumping agreement. However, taking a position on a disputed legal claim is not the same as misrepresenting a

material fact. Not only is it short of fraud, but it is difficult to imagine a situation in which a party seeking a release from a contested legal claim would actually concede the claim beforehand. Likewise, the argument that the consideration given to the plaintiffs was inadequate because it was no greater than that given to other employees is without basis in the law. Courts do not inquire into the adequacy of consideration, and any consideration, however slight, is legally sufficient to support a promise. E.G., Sambo's Restaurants v. City of Ann Arbor, 473 F. Supp. 41, 45 (E.D. Mich. 1979), Rev'd on other grounds, 663 F.2d 686 (6th Cir. 1981).

Those plaintiffs who accepted severance benefits in exchange for releasing R-P Basic from its obligations to them are bound by their agreement. Therefore, the Court shall enter summary judgment for defendants R-P Basic and R-P Inc. on the Section 301 claims of all plaintiffs who signed the release and accepted severance pay.

2. **ICIA**

The Court concludes that ICIA is entitled to summary judgment on the plaintiffs' Section 301 claims. ICIA ended any obligation it may have had to the plaintiffs when it deleted the cross-bumping agreement from the 1991 organic plant collective bargaining agreement.

There is a strong argument to be made that, in 1987, ICIA assumed the obligations of Stauffer Chemical Company's organic plant collective bargaining agreement because ICIA continued to employ the same workforce that

was already in place. See Howard Johnson Co. v. Detroit Joint Bd., Hotel & Restaurant Employees, 417 U.S. 249, 263, 94 S.Ct. 2236, 2244, 41 L.Ed.2d 46, 57 (1974). Furthermore, in 1988, ICIA entered its own organic plant bargaining agreement, which explicitly incorporated the cross-bumping agreement. However, when the 1988 agreement expired, ICIA did not renew the provisions regarding the cross-bumping agreement. To the contrary, the 1991 organic plant collective bargaining agreement, which provided that it "shall supersede and cancel the previous Agreement between the parties" contained no reference at all to the cross-bumping agreement. Appendix (filed September 18, 1992; Docket Entry No. 136) to ICIA's motion to dismiss at 273.

Therefore, if the plaintiffs have any contract rights that are enforceable against ICIA, those rights must be based on either the furnace plant collective bargaining agreement

or the cross-bumping agreement itself. But the plaintiffs face an insurmountable problem in basing a claim on either of those agreements: ICIA is a party to neither one.

The plaintiffs' claim that ICIA breached the furnace plant collective bargaining agreement is frivolous. That agreement is strictly between Local 912 and R-P Basic, and it does not create any liability for ICIA.

Likewise, the cross-bumping agreement is between Local 912 and Stauffer Chemical Company. When ICIA deleted any reference to it in the 1991 organic plant collective bargaining agreement, ICIA ended any obligation it may; have previously assumed.

The plaintiffs have argued at great length that their rights under the cross-bumping agreement "vested" in 1982, when they agreed to become part of a separate bargaining unit for the furnace plant. Cf. International Union, United Automobile Workers v. Yardman,

Inc., 716 F.2d 1476, 1479-1483 (6th Cir. 1983) (recognizing the vesting of retiree benefits upon retirement). Whether or not this is true or not is irrelevant to the plaintiffs' claim against ICIA. If the plaintiffs' rights did vest, they vested against Stauffer Chemical Company; and its successors in interest, not ICIA. The plaintiffs would like the Court to treat their transfer rights as though they were covenants that "run with the land" and bind all successive owners of the organic plant. But the common law of real covenants is another story, albeit an interesting one, having nothing to do with this case. The obligation that Stauffer Chemical Company undertook in entering the cross-bumping agreement was purely personal, and it rested only with Stauffer Chemical Company and its successors in interest.

3. **Local 912**

In Wooddell v. International Bhd. of Elec. Workers, 502 U.S. ___, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991), the Supreme Court held that a union member could maintain an action under LMRA Section 301 for breach of the union constitution. Relying on Wooddell, the plaintiffs claim that Local 912 violated the IUOE constitution in three respects: (1) by causing a "rupture of relations" between the plaintiffs and R-P basic; (2) by failing to live up to the duty of fair representation; and (3) by excluding the plaintiffs from voting on whether to delete the cross-bumping agreement from the 1991 organic plant collective bargaining agreement.[13] See plaintiff's memorandum in opposition to

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[13]The amended complaint further claims that Local 912 breached the cross-bumping agreement, as well as the organic and furnace plant collective bargaining agreements. However, the plaintiffs have failed to articulate any theory on which these claims are based, nor has the Court been able to divine one. Accordingly, the Court shall enter summary judgment on these claims in favor of Local 912.

summary judgment (filed October 13, 1992; Docket Entry No. 158) at 12, 27-28.

As the basis for the first allegation, the plaintiff cites Section XXIV(11)(c) of the IUOE Constitution, which prohibits local unions from causing a "rupture of relations existing under a legal contract with any employer." Plaintiffs' exhibit No. 51 (filed October 13, 1992; Docket Entry No. 160) at 104. However, a quick reading of this provision in its proper context shows that it has nothing to do with the plaintiffs' case. Rather, it is a prohibition against local unions organizing walkouts or other disruptions, except in appropriate circumstances.

The second allegation -- that Local 912 violated the IUOE constitution by not living up to its duty of fair representation -- is also unsupported by the test of the union constitution. The plaintiffs have pointed to

no provision, nor has the Court been able to locate one, which requires that IUOE locals live up to a duty of fair representation.

The plaintiffs' third allegation does have a basis in the union constitution, and they have submitted ample evidence to support it. Section XXIV(11)(e) provides that "proposed collective bargaining agreements and modifications thereof . . . shall not be executed until they have been presented at the next membership meeting . . . and have been approved by the membership affected." Plaintiffs' exhibit No. 51 (filed October 13, 1992; Docket Entry No. 160) at 105 (emphasis added). Local 912 has told the plaintiffs and this Court that deleting the cross-bumping agreement from the organic plant collective bargaining agreement foreclosed the plaintiffs' right to transfer. Furthermore, Local 912 refused to process the plaintiffs' grievance against R-P Basic on that basis.

Undeniably, the plaintiffs, who are members of Local 912, were "affected' by the change in the organic plant collective bargaining agreement. They have submitted evidence that they never approved that change. Therefore, the Court shall not grant summary judgment on the plaintiffs' claim that Local 912 breached Section XXIV(11)(e) of the IUOE constitution. See Ackley v. Western Conference of Teamsters, 958 F.2d 1463, 1477 (9th Cir. 1992) (recognizing Section 301 cause of action against union that denied plaintiffs' right to vote on proposed contract in violation of union constitution).

4. IUOE

Also relying on Wooddell v. International Bhd. of Elec. Workers, supra, the plaintiffs allege that IUOE has violated the union constitution.[14] In particular, they cite

[14]The plaintiffs also claim that IUOE breached the cross-bumping agreement and the furnace pant and organic plant collective bargaining agreements. However, the plaintiffs have not explained how IUOE could have

General President Frank Hanley's response to the letter from James Kincade requesting an interpretation of the union constitution, and they cite IUOE's failure to intervene in Local 912's affairs after learning of the conflict of interest between the furnace and organic plant bargaining units. See plaintiffs' memorandum in opposition to summary judgment (filed October 13, 1992; Docket Entry No. 158) at 10-11, 26.

Section VI(2) of the IUOE constitution provides that "[the general president] shall also be empowered to interpret the provisions of the Constitution and decide questions of law arising thereunder." Plaintiffs' exhibit No. 51 (filed October 13, 1992; Docket Entry No. 160) at 21. Referring specifically to this provision, James Kincade wrote to General President Hanley on June 26, 1990, and

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breached these agreements to which it is not a party. Therefore, the Court shall grant summary judgment to IUOE on these claims.

requested that President Hanley interpret Section XXIV(11)(e) of the IUOE constitution.[15] Plaintiffs' exhibit No. 7 (filed March 13, 1992; Docket Entry No. 66). After alerting President Hanley to the fact that the organic plant bargaining unit would try to rescind the cross-bumping agreement,[16] Mr. Kincade specifically inquired whether Section XXIV(11)(e) would permit one bargaining unit "to negotiate away the other [unit's] rights under the [cross-bumping agreement]" without the other unit's approval. Id. However, President Hanley did not answer Mr. Kincade's question. He merely said that it was not necessary at this time to interpret Section XXIV)11)(e) since the cross-bumping agreement

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[15]Section XXIV(11)(e) requires approval by "the membership affected" prior to execution of any proposed amendment to a collective bargaining agreement -- the same provision that Local 912 is now alleged to have violated.

[16]Mr. Kincade's letter states: "ICI's employees are very disgruntled and will probably try, encouraged by their Management, to negate and nullify the [cross-bumping agreement] that permits Rhone-Poulenc's employees to bump them." Plaintiff's exhibit No. 7.

was "already in existence" and not a "proposed" modification to a collective bargaining agreement. Plaintiffs' exhibit No. 8 (filed March 13, 1992; Docket Entry No. 66).

The Court concludes that there is a question of fact as to whether President Hanley's failure to respond to Mr. Kincade's question violated the union constitution. Mr. Kincade's letter stated that the organic plant employees were preparing to rescind the cross-bumping agreement and asked whether they could do so under the union constitution. President Hanley's response that the cross-bumping agreement was "already in existence" was beside the point and non-responsive to the question put to him. Ordinarily, courts give great deference to union officials' interpretation of their own constitution. United States v. Hoffa, 451 F.2d 706, 709 (6th Cir. 1971). However, when the constitution empowers a designated union official to

interpret the constitution and he fails to do so when asked, the Court thinks that it raises a question of fact whether the official has breached the constitution.

There is another question of fact whether IUOE breached Section VI(3) of its constitution. That section provides, in relevant part: "For the purpose of . . . assuring the performance of collective bargaining agreements or other duties of bargaining representative, . . . [the general president] shall have full power to . . . place such Local Unions and their officers and members under International Supervision . . . ." Plaintiffs' exhibit No. 51 (filed October 13, 1992; Docket Entry No. 160) at 22.

On July 10, 1991, two of the plaintiffs telefaxed a letter to President Hanley describing the conflict of interest in which the local union was embroiled and concluded as follows: "We would appreciate anything you

could do for us, as our union seems to be working against our best interest." Plaintiffs' exhibit No. 9 (filed march 13, 1992; Docket Entry No. 66). They also attached copies of their grievances against R-P Basic and ICIA. Although their letter did not inform President Hanley whether Local 912 intended to pursue the grievances, a response-letter from Mr. Kincade, dated July 16, 1991, indicated that Local 912 did not intend to pursue a grievance against R-P Basic because it would jeopardize Local 912's "fair and proper representation" of the organic plant bargaining unit. Plaintiff's exhibit No. 10 (filed March 13, 1992; Docket Entry No. 66) at 3. On August 15, 1991, President Hanley responded to the plaintiffs' telefax as follows:

> After reviewing this matter, I have determined that the referenced agreements were entered into by the Local Union as exclusive bargaining representative for the respective bargaining

> units, and that the International Union is not a party to those agreements. Accordingly, the International Union is without authority to alter or amend the terms of those agreements nor intervene in the subject matter of your letter.

Exhibit No. 5 (filed October 2, 1992; Docket Entry No. 152) to IUOE's motion for summary judgment.

President Hanley's response that the International Union is "without authority . . . to intervene" is contradicted by Section VI(3) of the union constitution, which provides that IUOE may place a local union under its supervision to "assure the performance" of the local union's functions as bargaining representative. Inasmuch as processing grievances against R-P Basic is one of Local 912's functions as bargaining representative, it appears that IUOE had the power to order Local 912 to process the grievance. Whether its failure to do so, despite its knowledge that Local 912 was not

going to proceed because of the conflict of interest, constitutes a breach of the IUOE constitution is another question of fact that may not be decided on summary judgment.[17]

**B. Duty of Fair Representation Claims**

The Supreme Court has explained the basis of the union's duty of fair representation as follows:

> The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent

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[17]The Court is mindful of the fact that the plaintiffs' claims against Local 912 and IUOE for breach of the union constitution concern the internal affairs of the union. For many years the Sixth Circuit Court of Appeals declined to intervene in such intra union matters. See Trail v. International Bhd of Teamsters, 542 F.2d 961, 966-68 (6th Cir. 1976). However, in Wooddell, the Supreme Court made it clear that Section 301 created a broad jurisdiction over claims for breach of union constitution. The Court said:

> Neither are we impressed by respondents' submission that our construction of § 301 will result in the inundation of the federal courts with trivial suits dealing with intra union affairs. While we are not persuaded that this argument should affect our interpretation of the language of the statute in any event, we find it unconvincing.

502 U.S. at ___, 112 S.Ct. at 500, 116 L.Ed.2d at 430-31.

> collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. . . . The duty stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law."

DelCostello v. International Bhd. of Teamsters, 462 U.S. at 165 n.14, 103 S.Ct. at 2290 n.14, 76 L.Ed.2d at 489 n. 14 (citations omitted).

The standard of care that a union must exercise under its duty of fair representation has traditionally been defined as "serv[ing] the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. at 177, 87 S.Ct. at 910, 17 L.Ed.2d at 850. Recently, the Supreme Court has stressed that great deference must nevertheless be accorded to a union's actions

on behalf of its members. In Air Line Pilots Assoc. v. O'Neill, 499 U.S. ___, ___, 111 S.Ct. 1127, 1130, 113 L.Ed.2d 51, 58 (1991), the Court said: "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048, 1058, (1953), as to be irrational."

Furthermore, the Court has emphasized that conflicts between employees within a bargaining unit are inevitable, and the mere fact that some may be displeased with their union's actions does not constitute a breach of the union's duty of fair representation.

> "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty in the exercise

> of its discretion." Ford Motor Co. v. Huffman, 345 U.S. at 338, 73 S.Ct. at 686, 97 L.Ed. at 1058. . . . [A union should not] be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

Humphrey v. Moore, 375 U.S. 335, 349, 84 S.Ct. 363, 372, 11 L.Ed.2d 370, 382 (1964).

Below, the Court separately treats the duty of fair representation claims against Local 912 and IUOE.

1. **Local 912**

The plaintiffs have come forward with sufficient evidence that Local 912 breached its duty of fair representation in two separate ways. First, Local 912 negotiated the cross-bumping agreement out of the organic plant collective bargaining agreement, despite the fact that doing so would severely hinder the plaintiffs' ability to transfer from the

furnace plant. Then, Local 912 refused to process a grievance against R-P Basic to remedy the company's denial of the union members' transfer rights.

Local 912 has attempted to characterize the plaintiffs' situation as being like the one that the Supreme Court described in Humphrey v. Moore, supra, that is, that the plaintiffs are merely dissatisfied because their union chose a course of action that favored other union members. However, neither Humphrey v. Moore nor the other case on which the defendants rely, e.g., Ackley v. Local 337, Int'l Bhd of Teamsters, 948 F.2d 267 (6th Cir. 1991), are apposite. In all of those cases, the union defendant acted in a manner which favored some members of the same bargaining unit over other members of that bargaining unit. In the instant case, however, Local 912 failed to act in the interest of any members of the furnace plant

bargaining unit. Rather, it acted solely for the benefit of the organic plant bargaining unit, to the absolute detriment of the furnace plant bargaining unit. Local 912's actions were not a compromise between competing members of the same bargaining unit; they were a complete sellout of an entire bargaining unit.

The Supreme Court has carefully worded its opinions in a way that distinguishes the right of a union to favor certain members within a bargaining unit from the favoring of one bargaining unit over another. In Humphrey, for example, the Court said: "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents." 375 U.S. at 349, 84 S.Ct. at 372, 11 L.Ed. at 382 (emphasis added). See also Air Line Pilots Assoc. v. O'Neill, 449 U.S. at ____, 111 S.Ct. at 1134, 113 L.Ed.2d at 63 ("the exclusive agent's

statutory obligation to serve the interests of all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility . . .") (emphasis added) (Quoting Vaca, 386 U.S. at 177, 87 S.Ct. at 910, 17 L.Ed.2d at 850); Ford Motor Co. v. Huffman, 345 U.S. at 337, 73 S.Ct. at 686, 97 L.Ed. at 1057 ("[labor unions'] statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all those members") (emphasis added). This distinction is proper, for it takes into account the fact that members of different bargaining units generally have no say in how another bargaining unit acts, even if the other unit is represented by the same union. By contrast, when a single bargaining unit is faced with a choice that may favor one faction within the unit, the unit's internal political processes will work to decide the

best course of action through discussion among all of the unit's members and, in most cases, a majority vote. The union, as the bargaining unit's exclusive representative, may then carry out the collective desires of the unit's membership.

In the instant case, Local 912 did not carry out the desires of any of the members of the furnace plant bargaining unit. To the contrary, it rebuffed them. By deleting the cross-bumping agreement from the organic plant collective bargaining agreement Local 912 greatly increased the risk that the plaintiffs would not succeed in transferring to the organic plant. In return for this sacrifice, members of the furnace plant bargaining unit got nothing (except the pleasure of knowing that their union had negotiated a good contract for another group of employees it happened to represent). From the perspective of members of the furnace plant bargaining

unit, Local 912's deleting the cross-bumping agreement from the organic plant bargaining agreement was completely arbitrary. Thus, a jury could find that it constituted a breach of Local 912's duty of fair representation.[18]

In addition, there is adequate evidence for a jury to find that Local 912's refusal to process the plaintiffs' grievance against R-P Basic violated the union's duty of fair representation.[19] Local 912 contends that its

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[18]There is paucity of reported opinions dealing with the situation here presented, that is a single union having a conflict of interest in representing two separate bargaining units. In one case, where the conflict was present but not at issue, the court observed: "[T]he extension of the principle of unfair representation to alleged preference of one bargaining unit over another by the same local has never, as far as we have been able to determine, been passed upon by the courts." Amalgamated Meat Cutters Local 195 v. Cross Bros. Meat Packers, Inc., 518 F.2d 113, 119 n. 13 (3d Cir. 1975). In a more recent case, the court entered judgment for the union upon find that there was no evidence that it had discriminated against the plaintiffs' bargaining unit in favor of another bargaining unit that it represented. Marshall v. Local Union No. 6, Brewers and Malsters, 960 F.2d 1360, 1370 )8th Cir. 1992).

[19]As the Court has explained above, the plaintiffs' claim that Local 912's failure to process their grievance violated the duty of fair representation is an essential element of the plaintiffs' "hybrid" action against Local 912 and R-P Basic. Thus, if it is determined that Local 912 is not liable for failing to process the grievance, then R-P Basic must also be found

failure to process the grievance could not have violated its duty because it believed in good faith that the grievance would fail on the grounds that the cross-bumping agreement was deleted from the organic plant collective bargaining agreement. Furthermore, Local 912 points out that this belief was based on the advice of its attorney. Exhibit H to Local 912's statement (filed September 18, 1992; Docket Entry No. 140) of uncontested facts.

Generally, a union is "free to take a position" on whether or not it wishes to pursue a grievance on behalf of its members, as long as the union "t[akes] its position honestly, in good faith and without hostility

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not liable on the plaintiffs' Section 301 claims. Conversely, if R-P Basic is found not liable on the Section 301 claim, then Local 912 must be found not liable on the failure-to-process claim.

However, the plaintiffs' other duty of fair representation claim, based on Local 912's deleting the cross-bumping agreement from the organic plant collective bargaining agreement, is separate from the "hybrid" cause of action. If Local 912 is found not liable on this claim, R-P Basic will not automatically escape liability on its Section 301 claim, and vice versa.

or arbitrary discrimination." Humphrey v. Moore, 375 U.S. at 349-50, 84 S.Ct. at 372, 11 L.Ed.2d at 382. In an ordinary case, a union's showing that counsel had advised it that a grievance was futile would adequately demonstrate that the union's refusal to process the grievance did not violate the duty of fair representation. However, when the proffered impediment to the success of the grievance is the union's own action, taken in disregard of its members' interests, the Court does not think the union should be allowed to profit from its earlier misdeed and thereby avoid liability on the grounds that it honestly believed that it had thrown away its members' rights. This is especially true in the instant case where Local 912 had lengthy consultations with its attorney before it ever agreed to delete the cross-bumping agreement from the organic plant collective bargaining agreement. See exhibit A (deposition of James

Kincade) to Local 912's statement of uncontested facts at 51-52.

Furthermore, there is evidence that Local 912's reluctance to process the grievance was not solely based on its belief that the grievance would fail. In a letter that Local 912's business manager, James Kincaid, sent to IUOE General President Hanley before Local 912's attorney advised that the grievance was futile, Mr. Kincade admitted that he feared what would happen if R-P Basic granted the plaintiffs' grievance. He wrote:

> Suppose Rhone-Poulenc grants the grievance. How can Local 912 make ICI[A] take the employees from Rhone-Poulenc[?] If Local 912 goes to court, in an effort to do so, where does that leave Local 912 with its members at ICI[A] as to fair and proper representation? This is one of the dilemmas I discussed with Branstetter, our attorney. This is one of the reasons he recommended against the grievance route.

Plaintiffs' exhibit No. 9 (filed March 13, 1992; Docket Entry No. 66) at 3.

There is adequate evidence to support a jury's finding that Local 912's refusal to process the plaintiffs' grievance violated its duty of fair representation. Accordingly, the Court shall not grant summary judgment on that claim.

2. IOUE

The plaintiffs' claim that IUOE breached its duty of fair representation is meritless. The duty of fair representation derives from the fact that a union is the exclusive bargaining representative of a bargaining unit, and the members are therefore completely dependent on the union to represent their interests. See, e.g., DelCostello, 462 U.S. at 165 n.14, 103 S.Ct. at 2290 n.14, 76 L.Ed.2d at 489 n.14. However, in the instant case, Local 912, not IUOE, was the exclusive bargaining representative of the plaintiffs.

The plaintiffs have attempted to gloss over this critical fact by treating Local 912

and IUOE collectively as "the Union Defendants." Amended complaint at ¶ 23. However, the Sixth Circuit Court of Appeals has previously passed on the relationship between IUOE and its individual locals. In Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980), the court stated:

> The International Union is a separate body from the local. The acts of the local and its agents cannot automatically be imputed to the International. This is clear from the International Union of Operating Engineers' Constitution which defines the relationship between the International and its affiliated locals. Under the constitution, the local unions govern themselves and transact business on their own behalf.

Id. at 97.

The Sixth Circuit's opinion in Allen v. Allied Plant and Maint. Co. of Tenn., 881 F.2d 291 (6th Cir. 1989), relied on by the plaintiffs, is not to the contrary. In that case, the collective bargaining agreement provided for IUOE to participate in the

handling of employee grievances thereby charging IUOE with a duty of fair representation. Id. at 297. Moreover, in that case, IUOE actually conspired to select an arbitrator that it thought was likely to rule against the employee. Id. This is a far cry from IUOE's role in the instant case, which at most consisted of a refusal to get involved when asked to do so. See Shimman, 625 F.2d at 98 ("The wrongful conduct of these local union leaders cannot be imputed to the International, absent proof of actual participation or ratification.").

There being no evidence that IUOE owed a duty of fair representation to the plaintiffs, or that it participated in or ratified the allegedly faulty representation by Local 912, the Court shall grant summary judgment to IUOE on this claim. See Ruzicka v. General Motors Corp., 523 F.2d 306, 309 (6th Cir. 1975).

**C. LMRDA Section 101 Claims.**

LMRDA Section 101, 29 U.S.C. § 411, is commonly called the union members' "Bill of Rights." Local No. 82, Furniture and Piano Movers v. Crowley, 467 U.S. 526, 536, 104 S.Ct. 2557, 2563, 81 L.Ed.2d 457, 467 (1984). It "guarantee[s] every union member equal rights to vote and otherwise participate in union decisions, freedom from unreasonable restrictions on speech and assembly, and protection from improper discipline." Id.

The parties have stipulated that the plaintiffs' LMRDA Section 101 claim "is limited to the allegations of the plaintiffs of their lack of involvement and participation in the declaratory judgment action [that Local 912 filed in October 1990 and voluntarily dismissed in June 1991] and in the 1991 negotiations between ICI[A] and Local 912 for the Collective Bargaining Agreement that resulted from those negotiations."

Stipulation (filed September 25, 1992; Docket Entry No. 145).

The Court concludes that summary judgment should be granted for the union defendants on both claims.

LMRDA Section 101 specifically designates which rights are protected under the Act. The right of union members to participate in a lawsuit filed by their union is not listed. As the Court of appeals for the District of Columbia Circuit has said: "`[D]emocracy' under the LMRDA is not merely a boundless ideal to be defined by the whim of any dissident voice; rather, the statutory notion of internal union democracy is precisely limited by the scope of the protections codified by Congress in the LMRDA." Carothers v. Presser, 818 F.2d 926, 929 (D.C. Cir. 1987).

Likewise, the right of union members to negotiate and vote on proposed collective bargaining agreements is strictly limited to

the bargaining unit that will work under the proposed agreement. Other union members, even though they may be affected by the agreement, have no Section 101 right to participate in negotiations or vote on the proposal.[20] Marshall v. Local Union No. 6, Brewers and Malsters, 960 F.2d 1360, 1369 (8th Cir. 1992) ("Local 6 properly excluded the yeast workers, non-members of the brewery workers' collective bargaining unit, from voting on the brewery workers' collective bargaining agreement. . . . Local 6 did not violate LMRDA . . . ."). Because there is no evidence that the union defendants violated any statutory right guaranteed to union members by LMRDA Section 101, the Court shall grant summary judgment for the defendants.

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[20]Of course, an individual union is free in its own constitution to grant its members greater rights than those guaranteed by LMRDA. Thus, the Court's conclusion that LMRDA Section 101 did not guarantee the plaintiffs a right to vote on the organic plant bargaining agreement does not mean that the IUOE constitution did not make such a guarantee. See supra part II.A.3.

## D. Pendent State Law Claims

The Court shall also grant summary judgment for the defendants on the plaintiffs' state law claims of tortious interference with a contract and civil conspiracy.[21]

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[21]The parties have argued at length whether the plaintiffs' state law claims are preempted by federal labor law. This question is difficult to answer because the basis of the claims is unclear. The amended complaint states, rather imprecisely, the state law claims as follows:

> 24. The Defendants acted in concert and conspired with each other to deprive Plaintiffs of vested contract rights. . . . Defendants tortiously interfered with vested contract rights of the Plaintiffs.

Amended complaint at ¶ 24.

To the extent that the plaintiffs are alleging that one of the defendants intentionally interfered with a contract to which it was not a party or otherwise bound, then that claim would not be preempted. See Dougherty v. Parsec, Inc., 872 F.2d 766, 771 (6th Cir. 1989) ("[A]llowing a state law action to proceed against a party who has not signed the labor contract, and whose obligations are not defined by the contract, will neither define nor modify the contractual relationship between the employer and the union, [which relationship is governed exclusively by federal law]."). However, as explained infra, the plaintiffs have failed to provide sufficient evidence to support any such claim.

To the extent that the plaintiffs allege that one of the defendants tortiously interfered with its own contract or conspired to breach its own contract, such a claim would be preempted as merely "relabelling" a LMRA Section 301 breach-of-contract action as a tort. Allis-Chalmers Corp. v. Lucek, 471 U.S. 202, 211, 105 S.Ct. 1904, 1911, 85 L.Ed.2d 206, 215 (197\85) ("Any other result would elevate form over substance and allow

1. **Tortious Interference with a Contract**

Tennessee law recognizes both a common law and a statutory cause of action for tortious interference with a contract. Polk and Sullivan, Inc. v. United Cities Gas Co., 783 S.W.2d 538, 542 (Tenn. 1989). The statutory cause of action,, Tenn. Code Ann. § 46-50-109, is merely a codification of the common law. Id. In order to recover for tortious interference with a contract, "the plaintiff must prove that there was a legal contract, of which the wrongdoer was aware, that he maliciously intended to induce a breach, and there must have been a breach, proximately caused by [the wrongdoer's] acts resulting in damages." Id. at 543. Tennessee law does not recognize tortious interference of a contract by one who is a party to the

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parties to evade the requirements of § 301 by relabelling their contract claims as claims for tortious breach of contract.").

contract. Koehler v. Cummings, 380 F.Supp. 1294, 1313 (M.D. Tenn. 1974).

Below, the Court separately treats the claims against each defendant.

**(a) ICIA**

The plaintiffs allege that ICIA, by deleting the cross-bumping agreement from the 1991 organic plant collective bargaining agreement, induced R-P Basic to breach its obligations under the cross-bumping agreement. However, there is no evidence that ICIA acted with malice. To the contrary, the Court concludes that ICIA was entirely justified in its actions. See Polk and Sullivan, Inc., 783 S.W.2d at 543 (Justification exists when "defendant has acted merely in the due exercise of his own right to carry on his business himself."). Once layoffs were announced at the furnace plant, ICIA reasonably feared having its organic plant employees displaced. It sought to avoid this

disruption by deleting the cross-bumping agreement from the organic plant bargaining agreement, thereby ending its obligation to accept the laid-off furnace plant employees.

The plaintiffs have offered no evidence that ICIA acted "maliciously" in deleting the cross-bumping agreement. Malice is an essential element of tortious interference with a contract under Tennessee law. Testerman v. Tragesser, 789 S.W.2d 553, 556-557 (Tenn. App. 1987). To act maliciously, in the sense that term is used as an element of tortious interference with a contract, means to act with "spite or ill will" toward the plaintiffs. Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1127 (6th Cir. 1981); Testerman v. Tragesser, 789 S.W.2d at 556-57. "No reasonable argument can be made" that ICIA's negotiation OF THE 1991 collective bargaining agreement "was motivated by spite or ill will against parties with whom it had never dealt."

Heheman, 661 F.2d at 1127. ICIA did no more than enter into a new contract on terms that were agreeable to it for its own legitimate business reasons.

**(b) R-P Basic and R-P Inc.**

The plaintiffs further claim that R-P Basic tortiously interfered with Local 912's contractual obligation to fairly represent them. They emphasize the fact that R-P Basic ordinally announced that layoffs would begin in February, 1991, but then delayed the layoffs until July, 1991. According to the plaintiffs, this delay was part of a calculated plan by R-P Basic to force Local 912 into negotiating a new organic plant collective bargaining agreement against the interests of the plaintiffs.[22]

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[22] To the extent that the plaintiffs allege that R-P Basic's delaying the layoffs contributed to its own breach of the furnace plant bargaining agreement, their claim is preempted by LMRA Section 301. See supra note 21. In any event, the R-P defendants would be entitled to summary judgment because Tennessee law does not recognize tortious interference with one's own contracts. Koehler v. Cummings, 380 F.Supp. at 1313.

Whether or not the plaintiffs' allegations are true, the R-P defendants are entitled to summary judgment, for the plaintiffs have produced no evidence that Local 912 is contractually bound to fairly represent them. As the Court has previously observed, the IUOE constitution does not contain any promise that the union will fairly represent its members. See supra part II.A.3. Local 912's duty of fair representation arises from the statutory scheme of federal labor law, not from the provisions of the IUOE constitution. See DelCostello v. International Bhd. of Teamsters, 462 U.S. at 165 n. 14, 103 S.Ct. at 2290 n.14, 76 L.Ed.2d at 489 n.14.

**(c) Local 912 and IUOE**

The plaintiffs make the additional claim that Local 912, by deleting the cross-bumping agreement from the organic plant collective bargaining agreement, induced R-P Basic to

breach the furnace plant collective bargaining agreement. They further claim that IUOE is liable because it ratified and participated in the actions of Local 912. However, Local 912 is a party to the furnace plant bargaining agreement. Therefore it cannot be liable for tortious interference with that agreement under Tennessee law. Koehler v. Cummings, 380 F.Supp. at 1313.

Furthermore, inasmuch as Local 912 did nothing that could constitute tortious interference with a contract, IUOE cannot be liable for ratifying and participating in Local 912's actions.

2. **Civil Conspiracy**

Tennessee law defines a civil conspiracy as follows: "a combination between two or more persons to accomplish by concert an unlawful purpose or to accomplish a purpose not in itself unlawful by unlawful means." Id. (citations omitted).

As the Court has just explained, the plaintiffs have failed to demonstrate that any of the defendants committed a tortious interference with a contract. Thus, the plaintiffs have not shown any "unlawful purpose" for which the defendants combined to use "unlawful means" to accomplish a lawful purpose. Accordingly, the Court shall grant summary judgment for the defendants on the plaintiffs' civil conspiracy claim.

**E. Jury Demand**

Defendant Local 912 has objected to the plaintiffs' request that this case be tried to a jury. Local 912 contends that the core of the plaintiffs' lawsuit is a demand for equitable relief against ICIA in the form of jobs at the organic plant. Therefore, Local 912 argues, this Court should treat this case as one in equity and try it without the intervention of a jury.

Whether or not Local 912's analysis is correct, it is irrelevant since the Court has dismissed ICIA as a defendant. AS it now stands, this action is essentially one for money damages. As such, the plaintiffs' jury demand shall be granted. See Teamsters v. Terry, 494 U.S. 558, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (jury trial was proper in hybrid Section 301/duty of fair representation action seeking monetary relief).

**F. Standing of Plaintiff Robert "Rickey" Farmer**

ICIA argues that plaintiff Robert "Rickey" Farmer has no standing in this action because he was hired too late to qualify for rights under the cross-bumping agreement. The Court disagrees.

The cross-bumping agreement creates a transfer right for any furnace plant employee hired prior to September 11, 1982, who had sufficient seniority to displace an existing

organic plant employee. Plaintiff Farmer was hired on August 15, 1977. Plaintiffs exhibit No. 50 (filed October 13, 1992; Docket Entry No. 160) at 72. At the time the cross-bumping agreement was executed, he had greater seniority than three organic plant employees. Plaintiffs exhibit No. 49 (filed October 13, 1992; Docket Entry No. 160) at 66.

Contrary to the assertion of ICIA, the fact that the three junior organic plant employees were in a different department from plaintiff Farmer is of no consequence. The cross-bumping agreement does not restrict transfer rights to particular departments.

**G. Standing of Plaintiffs Mark Hunt and Andrew Scott**

ICIA further challenges the standing of plaintiffs Mark Hunt and Andrew Scott. It alleges that they forfeited their rights to transfer to the organic plant when the declined an opportunity to transfer in

November, 1985. In support of this allegation, ICIA has submitted copies of "Notice of Intent" forms in which plaintiffs Hunt and Scott indicated that they waived their transfer rights. Appendix (filed September 18, 1992; Docket Entry No. 136) to ICIA's motion for summary judgment at 633-34.

However, plaintiffs Scott and Hunt have sufficiently rebutted ICIA's evidence to create a question of fact whether they ever declined an opportunity to transfer. According to the affidavit of Andrew Scott, an agent of R-P Basic told him that the "Notice of Intent" form would only become effective if there were layoffs at the furnace plant in 1985 and that the form would be destroyed if the layoffs were canceled. Plaintiffs' exhibit No. 15 (filed October 13, 1992; Docket Entry No. 160). Plaintiff Scott further avers that the 1985 layoffs were in fact canceled; thus, none of the plaintiffs ever had an

opportunity to exercise their transfer rights at that time. Id.

Because there is a question of fact whether plaintiffs Scott and Hunt ever waived their transfer rights, the Court shall not dismiss them as plaintiffs in this action.

III.

For the reasons set forth above, the Court shall grant the plaintiffs' jury demand.

The Court shall dispose of the various pending motions as follows:

**A. R-P Basic and R-P Inc.'s Joint Motion to Dismiss or for Summary Judgment**

The motion shall be granted in part and denied in part.

The Court shall enter summary judgment for the R-P defendants on all LMRA Section 301 claims, except the claims for breach of the cross-bumping agreement and the 1988 furnace plant collective bargaining agreement, brought by plaintiffs who did not sign a waiver

releasing R-P Basic from liability in exchange for severance benefits.

The Court shall enter summary judgment for the R-P defendants on all pendent state law claims.

Accordingly, the only claims remaining against R-P Basic and R-P Inc. are the LMRA Section 301 claims for breach of the 1988 furnace plant collective bargaining agreement and the cross-bumping agreement, brought by plaintiffs who did not sign a waiver releasing R-P Basic from liability.

**B. ICIA's Motion for Summary Judgment**

The motion shall be granted in full.

ICIA shall be dismissed as a party to this lawsuit.

**C. Local 912's Motion for Summary Judgment**

The motion shall be granted in part and denied in part.

The Court shall enter summary judgment for Local 912 on all LMRA Section 301 claims,

except the claim for breach of Section XXIV(11)(e) of the IUOE constitution.

The Court shall enter summary judgment for Local 912 on the LMRDA Section 101 claims and the pendent state law claims.

The Court shall deny summary judgment on the duty of fair representation claims.

Accordingly, the only claims remaining against Local 912 are the LMRA Section 301 claims for breach of Section XXIV(11)(e) of the IUOE constitution and the duty of fair representation claims.

**D. IUOE's Motion for Summary Judgment**

The motion shall be granted in part and denied in part.

The Court shall enter summary judgment for IUOE on all LMRA Section 301 claims, except the claim that IUOE breached Sections VI(2) and VI(3) of the IUOE constitution.

The Court shall enter summary judgment for IUOE on the duty of fair representation

claims, the LMRDA Section 101 claims, and the pendent state law claims.

Accordingly, the only claims remaining against IUOE are the LMRA Section 301 claims for breach of Sections VI(2) and VI(3) of the IUOE constitution.

An appropriate order shall be entered.

/s Thomas A. Higgins
Thomas A. Higgins
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

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| ALBERT AKINS, et al. | ] | |
| | ] | |
| v. | ] | No. 1-91-0134 |
| | ] | Judge Higgins |
| ICI AMERICAS INC., et al. | ] | |

O R D E R

In accordance with the memorandum contemporaneously entered, the plaintiffs' jury demand is granted.

The various motions before the Court are disposed of as follows:

1. Joint Motion (filed February 14, 1992: Docket Entry No. 51) of defendants Rhone-Poulenc Basic Chemicals Company and Rhone-Poulenc, Inc. to dismiss or for summary judgment.

The motion is granted in part and denied in part.

Summary judgment is granted for the movants on all LMRA Section 301 claims, except the claims for breach of the crossbumping agreement and the 1988 furnace plant

collective bargaining agreement, brought by plaintiffs who did not sign a waiver releasing Rhone-Poulenc Basic Chemicals Company from liability in exchange for severance benefits. Summary judgment is granted for the movants on all pendent state law claims.

Accordingly, the only claims remaining against Rhone-Poulenc Basic Chemicals Company and Rhone-Poulenc, Inc. are the LMRA Section 301 claims for breach of the 1988 furnace plant collective bargaining agreement and the cross-bumping agreement, brought by plaintiffs who did not sign a waiver releasing R-P Basic from liability.[1]

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[1]The only plaintiffs whose signed waivers are part of the record are the following: Gene Barker, Tony Brock, William T. Colvert, Robert Gilliam, Danny S. Green, Jerry Hicks, Walter Hudspeth, Mark Hunt, Nadine James, Richard W. James Jr., William L. Jarrett, Terry Jennings, Raymond Neely, Terrance Nevette, Ralph Osborn, David Paley, Michael Pilkinton, Charles S. Robinson Jr., James R. Scott Jr., Joseph Shyes, Sharon Liles Steiner, William T. Thomason, Robert J. Tidwell, and Geneva Wiggins.

2. Motion (filed September 18 1992: Docket Entry No. 133) of defendant ICI Americas, Inc. (now "Zeneca, Inc.") for summary judgment.

The motion is granted in full.

ICI Americas, Inc. is dismissed as a party to this lawsuit.

3. Motion (filed September 18, 1992: Docket Entry No. 138) of defendant Local Union No. 912, International Union of Operating Engineers for summary judgment.

The motion is granted in part and denied in part.

Summary judgment is granted for the movant on all LMRA Section 301 claims, except the claim for breach of Section XXIV(11)(e) of the IUOE constitution.

Summary judgment is granted for the movant on the LMRDA Section 101 claims and the pendent state law claims.

Summary judgment is denied on the duty of fair representation claims.

Accordingly, the only claims remaining against Local Union No. 912, International

Union of Operating Engineers, are the LMRA Section 301 claim for breach of Section XXIV(11)(e) of the IUOE constitution and the claims for breach of the duty of fair representation.

4. Motion (filed October 2, 1992; Docket Entry No. 149) of defendant International Union of Operating Engineers for summary judgment.

The motion is granted in part and denied in part.

Summary judgment is granted for the movant on all LMRA Section 301 claims, except the claims for breach of Sections VI(2) and VI(3) of the IUOE constitution.

Summary judgment is granted for the movant on the duty of fair representation claims, the LMRDA Section 101 claims, and the pendent state law claims.

Accordingly, the only claims remaining against International Union of Operating Engineers are the LMRA Section 301 claims for

breach of Sections VI(2) and VI(3) of the IUOE constitution.

It is so ORDERED.

/s Thomas A. Higgins
Thomas A. Higgins
United States District Judge
6-28-93

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

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| ALBERT AKINS, et al. | ] | |
| | ] | |
| v. | ] | No. 1-91-0134 |
| ICI AMERICAS INC., et al. | ] | Judge Higgins |

# MEMORANDUM

The Court has before it the motions[1] of each of the remaining defendants for reconsideration, to alter or amend or certify

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[1]Defendant International Union of Operating Engineers filed its motion on July 14, 1993 (Docket Entry No. 174); defendant Local Union No. 912, International Union of Operating Engineers filed its motion on July 14, 1993 (Docket Entry No. 176); and defendants Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co. filed their joint motion on July 15, 1993 (Docket Entry No. 182).

Defendant Local 912, International Union of Operating Engineers also filed a motion on August 11, 1993 (Docket Entry No. 189) for oral argument and postponement of trial date. Defendant International Union of Operating Engineers filed a similar motion on August 12, 1993 (Docket Entry No. 190). The Court is adequately familiar with the issues in this case. Therefore, further argument is unnecessary, and these motions for oral argument and postponement of trial date shall be denied.

for interlocutory appeal this Court's order entered June 29, 1993 (Docket Entry No. 172). For the reasons set forth below, the Court shall deny the aforementioned motions.

I.

The facts of this case have been fully described in the Court's memorandum entered June 29, 1993 (Docket Entry No. 171).

The action is set to be tried before a jury on Monday, October, 18, 1993.

II.

a. Motions to amend.

In its previous memorandum entered June 29, 1993 (Docket Entry No. 171), the Court stated the reasons for denying in part the remaining defendants' motions for summary judgment. The Court continues to rely on those reasons as the basis for denying the instant motions for reconsideration and to alter or amend.

However, it appears from the motion papers that the plaintiffs, Robert R. Farmer, Mike Fazekas, Gerald Isabell, William F. Jarratt, John R. Lindsey, and James D. Riddle, have signed waivers, exhibit No. 2 to supplemental affidavit of Paul S. Pruett (filed July 23, 1993; Docket Entry No. 184), that release defendant Rhone-Poulenc Basic Chemicals Co. from all its obligations to them in exchange for severance benefits. Therefore, the Court shall enter summary judgment in full to defendants Rhone-Poulenc Basic Chemicals Co. and Rhone-Poulenc, Inc. on all claims by these plaintiffs. See memorandum entered June 29, 1993 (Docket Entry No. 171) at 19-23.

b. Motions to certify for interlocutory appeal.

Interlocutory appeal "should be sparingly granted. In re April 1977 Grand Jury Subpoenas, 584 F.2d 1366, 1369 (6th Cir.

1974). A would-be appellant has the burden of convincing a district court that "exceptional circumstance" justify departing from the ordinary practice of awaiting final judgment in order to avoid piecemeal litigation. Coopers & Lybrand v. Livesay, 437 U.S. 463, 474-75, 98 S.Ct. 2454, 2461, 57 L.Ed.2d 351, 361-62 (1978).

Four elements must be present before a district court may certify an order for interlocutory appeal:

> (1) The question involved must be one of "law"; (2) it must be "controlling"; (3) there must be substantial ground for "difference of opinion" about it; and (4) an immediate appeal must "materially advance the ultimate termination of the litigation."

Cardwell v. Chesapeake and Ohio Ry. Co., 504 F.2d 444, 446 (6th Cir. 1974) (quoting 28 U.S.C. § 1292(b)).

An interlocutory appeal would not materially advance the termination of this litigation. Pre-trial discovery is complete,

and trial is set to begin less than two months from now. By contrast, many more months would pass before this case could be heard by the Sixth Circuit Court of Appeals on an interlocutory basis. See id. Furthermore, the facts of this case are in dispute. A trial on the merits will distill the pure questions of law and provide a complete record for any subsequent appeal.

Therefore, certification for an interlocutory appeal is not warranted.

III.

For the reasons set forth above, the motions for reconsideration, to alter or amend or certify for interlocutory appeal shall be denied.

Further, summary judgment in favor of the defendants, Rhone-Poulenc Basic Chemicals Co. and Rhone-Poulenc, Inc., shall be granted on the claims of the plaintiffs, Robert R. Farmer, Mike Fazekas, Gerald Isabell, William

F. Jarratt, John R. Lindsey, and James D. Riddell.

/s Thomas A. Higgins
Thomas A. Higgins
United States District Judge
8/26/93

UNITED STATES DISTRICT COURT MIDDLE DISTRICT
OF TENNESSEE NASHVILLE DIVISION

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|---|---|---|
| ALBERT AKINS, et al. | ] | |
| | ] | |
| v. | ] | No. 1-91-0134 |
| | ] | Judge Higgins |
| ICI AMERICAS INC., et al. | ] | |

O R D E R

In accordance with the memorandum contemporaneously entered, the following motions are denied:

1. Motion (filed July 14, 1993; Docket Entry No. 174) of the defendant, International Union of Operating Engineers, to alter or amend or certify for interlocutory appeal.

2. Motion (filed July 14, 1993; Docket Entry No. 176) of the defendant, Local Union No. 912, International Union of Operating Engineers, for reconsideration or certify for interlocutory appeal.

3. Motion (filed July 15, 1993; Docket Entry No. 182) of the defendants,- Rhone-Poulenc Basic Chemicals Co. and Rhone-Poulenc,

Inc., for reconsideration or certify for interlocutory appeal.

4. Motion (filed August 11, 1993; Docket Entry No. 189) of the defendant, Local Union No. 912, International Union of Operating Engineer, for oral argument and postponement of trial date.

5. Motion (filed August 12, 1993; Docket Entry No. 190) of the defendant, International Union of Operating Engineer, for oral argument and postponement of trial date.

Further, summary judgment is granted in full to defendants Rhone-Poulenc Basic Chemicals Co. and Rhone-Poulenc, Inc. on all claims brought by plaintiffs Robert R. Farmer, Mike Fazekas, Gerald Isabell, William F. Jarratt, John R. Lindsey, and James D. Riddle.

It is so ORDERED.

/s Thomas A. Higgins
Thomas A. Higgins
United States District Judge
8/26/93

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, et al.,

Plaintiffs,

vs. No. 1-91-0134
Judge Higgins

ICI AMERICAS, INC., et al.,

Defendants.

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TRANSCRIPT OF PROCEEDINGS - BENCH RULING

VOLUME IV OF 4

BEFORE THE HON. THOMAS A. HIGGINS,
U.S. District Judge and a Jury,
on October 21, 1993

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APPEARANCES:

As hereinbefore noted.

## P R O C E E D I N G S

(Whereupon, the following proceedings were held within the presence and hearing of the jury, to-wit:)

THE COURT: Good morning, ladies and gentlemen, have your seats, please.

THE CLERK: Columbia Civil Action 1-91-0134, Albert Akins and others versus ICI Americas and others.

Plaintiffs present and ready?

MR. STEINER: Plaintiffs are ready, Your-Honor.

THE CLERK: Defendants present and ready?

MR. OZIER: Rhone Poulenc defendants are ready, Your Honor.

MR. BRANSTETTER: Defendant Local 912 is ready.

MR. BARRETT: Defendant International present and ready, Your Honor.

THE COURT: Ladies and gentlemen of the jury, I have asked the Marshal to have you

come into court this morning because the court has determined, after having fully heard the evidence of the plaintiffs in this case and the arguments of the lawyers at considerable length, that this is a matter for resolution by the court and not a matter for submission to you for resolution. This determination is reached as a matter of law. But I want you here because I think it's important that you know the reasons why the court has reached the decision it has reached.

Federal Judges have a duty of accountability to the public and to the litigants who come before the court, and that duty of accountability is broader than just advising the lawyers for the parties of the reasons for the court's actions. The people who bring the lawsuit have a right to know why a decision is reached and to have the benefit of a reasoned analysis for the court's decision.

And I think it's also important that you know because you have been summoned and are part of the process, and I don't want you to leave thinking that your time has been wasted or you serve no useful purpose. You are the forum before whom this matter was submitted, in anticipation that it would ultimately come to you for resolution. Not all cases go to the jury for ultimate resolution if the matter to be determined turns out to be determined as a matter of law.

So I think you should know that you haven't wasted your time. You have served a useful purpose. You were the forum before whom these parties came in and presented their case, and for that reason I want you to know as well as these many plaintiffs who are gathered here in this big room as well as the representatives of the parties the reasons why the court has reached a decision that this case is to be decided as a matter of law and

not submitted to you for your consideration and deliberation.

We are now at the close of the plaintiffs' proof. The plaintiffs have put on their case in chief. Rule 50 of the Federal Rules of Civil Procedure provides for judgments as a matter of law, if during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim that cannot, under the controlling law, be maintained without a favorable finding on that issue. Now we are at that point. The plaintiffs have been fully heard, their case in chief has been closed, and the defendants have made their motions for judgment as a later of law.

Now at this juncture the court is required under the applicable rule to view all the evidence in the light most favorable to the plaintiffs, to discard the countervailing evidence, and view all inferences that may be well taken in favor of the plaintiffs.

This case, in a certain respect, is relatively unusual. Perhaps it might not be correct to say it is unique, but it is relatively unusual. The parties agree that the basic instruments, the writings between the parties, are unambiguous, they are clear and they present matters that call for the court's construction or interpretation.

And I note the plaintiffs, in their pretrial brief filed October 14, 1993, at Docket Entry 234, states the cross bumping agreement, the applicable collective bargaining agreements and the union constitutions are clear; and that raises these

matters for the court's consideration and its determination as a matter of law.

Now in this case the plaintiffs are former and some still presently are employed by the defendant Rhone Poulenc, Inc. and Rhone Poulenc Basic Chemicals Company, the two named corporate defendants; some are former employees as a result of a layoff and some others remain employed for a limited period of time as a part of the close down procedures for what is commonly referred to as the furnace plant.

Now in this case the first claim asserted- by the plaintiffs is a claim under Section 301 of the Labor Management Relations Act. In Section 301 the Congress provided that members of a labor organization may bring a cause of action against the labor organization for a breach of the duty of fair representation, and against the employer for a breach of the collective bargaining agreement.

This type of claim under Section 301 of the Labor Management Relations Act is sometimes referred to as a hybrid claim. It is called a hybrid claim because in order to succeed, the plaintiffs, who bring the action, must establish their cause of action against both the union for a breach of the duty of fair representation and against the employer for a breach of the collective bargaining agreement.

If the party who brings the action, the plaintiffs, fail on either prong, that is, fail to establish their claim of a breach of a duty of fair representation or if they fail to establish their claim of a breach of the collective bargaining agreement, their action fails. They have to succeed, in very plain words, in their claim against both the union, their statutory bargaining agent and representative, and they have to succeed in

their claim against the employer under the collective bargaining agreement.

Now in this case the relevant, salient facts bearing on this first claim of the plaintiffs arises out of the history of the operation of the former Stauffer Chemical Company plant at Mt. Pleasant, which at one time owned both facilities, that is, what is known as the furnace plant and the organic plant.

The evidence in this case tells us that the employees at both these plants, which at one point were owned by the Stauffer Chemical Company, were covered by the same collective bargaining agreement between Stauffer and Local 912 of the International Union of Operating Engineers.

In September of 1982, Stauffer and Local 912 agreed to divide the two plants into separate units for purposes of collective bargaining agreements. As a part of the

process of negotiating separate collective bargaining agreements, Stauffer and Local 912 agreed to a separate memorandum of agreement that has been referred to in this case as the memorandum agreement of September 1982, even though the agreement itself is not dated; it has also been referred to in common parlance as the cross bumping agreement. And this agreement was incorporated by reference in the two collective bargaining contracts covering the furnace plant and the organic plant in 1982.

Now as to this memorandum agreement, which is before the court and in evidence, and which the parties agree is unambiguous, any questions about its interpretation and construction are questions for the court. Certain employees of both plants who had sufficient seniority were given a one time opportunity to bump, as the term is used, or displace less senior employees in the

other plant in the event of their layoff from either facility.

Now I am going to pause at this point and say that the agreement is before the court and it says what it says. At certain points in the papers submitted to the court the suggestion was made by the plaintiffs that this was some kind of job guarantee, and it is important that the court disabuse that notion. This instrument did not guarantee jobs. It spoke very specifically about the right on a one-time basis, under certain conditions, assuming certain skills existed or could be demonstrated, to transfer from one plant to another, and at that time, when it was adopted and agreed to, both plants were owned by a common employer.

Now this memorandum agreement was again incorporated into the collective bargaining agreements that were negotiated for each plant by Stauffer and Local 912 in 1985.

After the agreement of 1985 became effective, certain changes in ownership of the chemical plant at Mt. Pleasant owned by Stauffer took place and through a series of changes of ownership it developed that in 1987, during the existence of the 1985 collective bargaining agreement, that the furnace plant wound up being owned by the Rhone Poulenc companies and the organic plant wound up being owned by the Imperial Chemical Corporation, commonly referred to as ICIA.

Now at the time the collective bargaining agreements of 1985 expired, the evidence in this case reflects that both ICI at the organic plant and Rhone Poulenc at the furnace plant negotiated separate collective bargaining agreements with Local 912 in 1988. During these negotiations the evidence tells us, and in that respect Mr. Paley was on the negotiating committee for the furnace plant in 1988, Rhone Poulenc tried to get Local 912 to

agree to delete all references to the 1982 agreement. And we were also told through the evidence that ICI, likewise, sought to obtain the deletion of that agreement from being incorporated into any new agreement in 1988. However, the union refused, and the 1988 collective bargaining agreements subsequently negotiated with regard to both plants stated the memorandum agreement was considered supplemental, again, that is, it was incorporated by reference, and would remain in effect for the duration of the collective bargaining agreement.

Now although Rhone Poulenc was not successful in getting Local 912 to delete any reference to the memorandum agreement, the parties in that series of negotiations, in which Mr. Paley, the last witness we heard,

Participated, did get the union to agree as the last item on the bargaining table to a new agreement referred to as the October

1988 agreement. In this agreement, again it is in evidence, and before the court, it is agreed that if it presents any questions as to its construction are questions that are presented to the court, the net effect of that agreement is to clarify the obligation of Rhone Poulenc under the 1982 agreement, and that agreement contains the words to the effect that if a layoff occurs and the layoff takes place according to the sections of the collective bargaining agreement regarding seniority, or if the layoffs take place under the terms of the 1982 memorandum of agreement, then the company would have fulfilled all of its obligations under the 1982 memorandum agreement.

Now in 1990 an announcement was made that the furnace plant would close over some period of time resulting in a layoff of its employees, including most of the plaintiffs.

Now the evidence tells us that pursuant to the memorandum agreement, Rhone Poulenc took steps to facilitate the transfer of its employees to the organic plant by providing the employees with a form on which laid off employees could indicate their desire to transfer, and these were forwarded to ICI, which returned them and evidenced its refusal to accept the requested transfers.

Now when the plaintiffs were not permitted to transfer to ICI, that is, to its organic plant, this lawsuit resulted in due course.

Now the court has determined that, as a matter of law, the defense of impossibility, or what is sometimes called the Doctrine of Impracticability, governs the disposition of this first claim. In this case, as a result of the change of ownership of the two plants, it simply became impossible for Rhone Poulenc to compel another

corporation to take its employees. It did what it could It assisted in facilitating the employees by furnishing them a form to indicate their desire to transfer, but there was simply no way that Rhone Poulenc could force another corporation to take the furnace plant employees.

Now in this respect, and I'm going to omit formal citations, it is well accepted, as stated in the Restatement of Contracts, and in this respect I quote, Where after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non occurrence of which was a basic assumption on which the contract was made his duty to render that performance is discharged, unless the language or circumstances indicate to the contrary.

Now a very down home but sensible illustration was made during the course of this trial in a series of questions put to one

of the witnesses, and the questions were to the effect, how could Rhone-Poulenc succeed in causing the transfer of these employees if the plant had been destroyed, or if a natural disaster had occurred and a giant crevice the result of an earthquake had opened up and swallowed it? The law recognizes that Rhone-Poulenc simply has no obligation under those circumstances. It is an occurrence of an event, the non occurrence of which was a basic assumption, that had taken place. Rhone-Poulenc would have no duty to rebuild ICI's plant so as to carry out the provisions of the transfer agreement. For this reason the court sustains the motion of the corporate defendants based upon the Doctrine of Impracticability and determines as a matter of law that Rhone-Poulenc was confronted with the circumstances that are evidenced in this record and that the fact that the two plants presently owned or were at the time that this

event occurred by two totally different independent employers is an event that rendered it impossible for Rhone-Poulenc to fulfill its obligation, and its obligation is excused and there is no breach of the contract. There being no breach of the contract on the part of the employer under the collective bargaining agreement, and the plaintiffs having failed on that prong, there is no need for the court to reach the question of whether there was a breach of fair representation. The duty of fair representation on the part of the union, is the other underpinning of the first claim, the 301 hybrid claim. The plaintiffs must prevail on both prongs of the claim, and if they fail on either, it renders moot the question of whether there was a breach on the part of the other.

Accordingly, I grant judgment as a matter of law to the defendants, the Rhone-

Poulenc defendants, and to the Local on the hybrid Section 301 claim.

Now the next claim that the plaintiffs make in this case is a claim against the local union, 912, with regard to an alleged breach of a duty of fair representation in negotiating out of the contract the cross bumping agreement from the collective bargaining agreement that governed the relationship between the members of the union and the company that owned the organic plant.

Now in this instance, the duty of fair representation is a statutory obligation created by federal law that imposes on the exclusive agent, that is, the union, as the statutory bargaining representative for the members of the union, a duty to represent all members of a designated unit by serving the interest of all members of the unit without hostility or discrimination toward any of the

members and to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct.

Those are the obligations of the statutory bargaining agent, the union, with regard to its duty of fair representation.

Now in this case the evidence reflects that in 1982 the membership of this union agreed to the division of the union into two bargaining units, and this was a decision of the membership of the union. And when the occasion arose to negotiate a contract with respect to the two plants, the members of the bargaining unit that was composed of the employees at each plant, through the democratic processes of the union organization, elected their own members to the bargaining committee and also instructed the bargaining committee as to the demand to be made. The proof in this case is undisputed that in each instance the bargaining committee

was given the power to approve and ratify the contract pursuant to the terms of the union constitution without referring the proposed contract back to the membership for approval by a vote of the membership.

Now Mr. Paley expressly confirmed that this was the practice, that it governed his election to the bargaining committee, the furnace plant bargaining committee in 1988. He confirmed that they were instructed by the demand to be made, and he also confirmed that members of that bargaining unit authorized his committee to adopt and approve the collective bargaining agreement without bringing it back to the members of that unit for their vote and approval. And Mr. Paley's testimony also confirms that this same process was established by the membership of the collective bargaining committee for the organic plant.

Now in this case the court has viewed the evidence according to the standard that is applicable and has determined that under the three-part test there is no evidence of any hostile or discriminatory action on the part of the union. These questions were put to the witnesses and they disavowed that there was any hostility or discrimination in the sense that those terms are commonly understood in this area. There was no suggestion that the members of the furnace plant unit were being punished or discriminated against because of any positions that they had taken, or any operation or effect of internal union politics. The court has also viewed the evidence under the applicable standard and is satisfied that there is no proof as would be required of a bad faith motive; that is, the union has a duty of acting in good faith. There is no evidence in this record of any bad faith motive.

After the change of the ownership of these companies took place of these plants, it became common knowledge that there might be problems presented, it was a matter widely discussed, the fact that a suit was filed in this court at one time that was subsequently dismissed attempting to obtain a declaration of the parties' rights was a fact that was well known There is nothing to suggest that there was something concealed; the fact that a problem hovered over the horizon was known, it was open, it was widely discussed, and there was also a widely felt concern as to the uncertainty that stemmed from the change in ownership. But the court finds, as the courts have said in other cases, that in this dynamic of labor management relations, there are going to be winners and losers, and so long as the actions of the union are not arbitrary in the sense that they are irrational, the fact that an unhappy result comes about doesn't give

rise to a sustainable claim of a breach of the duty of fair representation.

I am going to pause at this point. The suggestion has been made that in some fashion as a result of the 1982 agreement there was a guarantee of jobs. And I have are already alluded to that. That is not what that agreement provided. It provided very carefully a one-time right of transfer between plants under certain conditions and with certain consequences. And while there has been the suggestion implicit in this record that these plaintiffs feel that they have been stung wrongfully by being deprived of a job they thought they had for a lifetime, that is simply not the case. That agreement never purported to guarantee the existence of a job. And, as one court noted in another case, when people talk about having a job forever, forever in terms of labor management relations, means only until the next

collective bargaining agreement is negotiated, and it does not mean forever as forever until the end of time.

And I hold as a matter of law that the evidence in this case fails to make a submissable issue of a breach of the duty of fair representation with respect to -- of the removal or the preventing of the removal of the 1982 cross bumping agreement from the organic plant's collective bargaining agreement. That agreement was negotiated by a duly constituted negotiating committee, created and instructed in the usual and accepted fashion, and authorized to approve the results of the negotiations, the new agreement, and that there was no breach of the duty of fair representation on the part of the union in not taking steps to prevent that committee from negotiating its own collective bargaining agreement.

Accordingly, the Section 301 contract claim, 301 breach of the duty of fair representation in that respect, is dismissed.

Now the third claim is again a claim under Section 301 against the union, and this is what is called a constitutional claim, meaning a breach of contract claim based upon the Constitution of the International Union of Operating Engineers, which is a contract by its terms between the International Union and the local union, the members of the union being beneficiaries of that contract.

And the Supreme Court of the United States has relatively recently made explicit what other circuit courts have previously held, and that is that there is a claim under Section 301 for a breach of contract in the sense in which this claim is made, and the basis of this claim is the insistence by the plaintiffs that there was a breach of the Constitution or that is a breach of contract

on the part of the local union by excluding the plaintiffs from having the opportunity to vote on whether to delete the cross bumping agreement from the 1991 organic collective bargaining agreement.

The court determines that this claim is disposed of by the provisions of the International Union Constitution, the contract, in that Article XXIV, Subdivision 11 (e), dealing with contracts, provides "Proposed collective bargaining agreements and modifications thereof may be negotiated for local unions by the business manager, by a committee, by the local executive board, or by the business representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, provided, however, that a local union may

delegate to its local executive board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to the vote of its membership."

Now with respect to this claim, the court finds that this provision of Article XXIV, Subdivision 11, Section (e), was explicitly carried out in regular fashion and is reflected in the testimony in this case. The membership of the designated bargaining unit elected its own negotiating committee, instructed that negotiating committee with regard to the demands to submit in negotiations with the company and also expressly authorized that bargaining committee to approve such agreements without submission of the same to the vote of its membership.

The court holds that there was complete compliance with the provision of the International Constitution, which constitutes

a contract, the alleged breach of which is the basis for this claim. The contract was approved by a duly constituted bargaining committee, those members of the unit who were affected by it, and the court determines as a matter of law that this claim should be dismissed. The plaintiffs have failed to sustain the allegation of a breach of the Constitution, which constitutes a contract.

Now there is yet one other claim that was alleged by the plaintiffs, and this is the plaintiffs' claims against the International Union. The plaintiffs allege with regard to the International Union that the International Union breached its Constitution, which constitutes a contract, in two respects. First, it alleges a claim under Article VI of the Constitution that relates to the powers and duties of the general president, and specifically it alleges that there was a breach of Section 2 of Article VI;

Article VI is captioned To Review Cases And Interpret Laws, Et Cetera. Section 2, he shall review all cases, complaints and charges filed with the general executive board or the general secretary-treasurer. He shall be empowered to render decisions on the merits of such cases, complaints and charges and his findings on the facts shall be final and conclusive. He shall also be empowered to interpret the provisions of the Constitution and to decide questions of law arising thereunder. He shall be vested with all the administrative powers of the organization.

Now in this respect the plaintiffs claim that there was a breach of this provision of the Constitution, constituting a contract, because a request was made on the general president by a letter from Mr. Kincade for a decision with regard to certain matters arising out of this 1982 memorandum agreement when it became apparent what the prospects

were on the horizon as a result in the change of ownership of these two plants.

And Mr. Kincade wrote a detailed letter to the general president asking him for his opinion and decision in the matter, and the general president responded to that by stating that there was no proposed agreement or modification presently pending or presented to him for resolution. This letter was written in the summer, as I recall the evidence, of 1990. The collective bargaining agreement was in existence from 1988 to 1991 and the president, vested with the unlimited discretion under another provision of the contract, of the Constitution, exercised his discretion and judgment and stated that a decision was not called for because there was no actual proposed agreement or modification presented to him, in his words, quote, at this time, close quote.

The court finds that by virtue of the unlimited discretion vested in the general president that there was no breach of this agreement. His determination not to resolve the hypothetical question at that point was not totally irrational. It may well be that the court, this court or another court, might disagree with the decision of the president, and it is not to say that he could not have exercised his discretion differently and responded to the question put to him in a substantive fashion, but these are matters for resolution under the terms of the Constitution and it is not for the courts to substitute their judgment for the judgment of the union officials unless the action of the union officials are irrational and have no foundation.

And I find that given the unlimited discretion vested in the president, that his actions cannot fairly be characterized as

irrational and unfounded. It may well be unsatisfactory, but it does not constitute a breach of the agreement.

The second aspect of the claim against the International Union rests upon the claim of Article VI, Section 3 of the Constitution, which provides that, in substance, the president shall have full power to place the local ions and their officers and members under supervision. And in this respect the president received a letter from two of the plaintiffs, Mr. Nevette and Mr. Carroll, stating that they would appreciate anything that he could do for them asserting that their union, Local 912, seems to be working against their interest, and asked him to take steps so as to preserve the right of transfer.

Mr. Hanley, the president of the union, the evidence reflects, responded to that letter and held that having reviewed it

he determined that the agreements were entered into by the local union as the exclusive bargaining representative for the respective bargaining units and that the International Union was not a party to those agreements, and that the International Union would not intervene in the subject matter raised by Mr. Nevette and Mr. Carroll.

Now the court finds that it is unnecessary to address this claim because the plaintiffs conceded in argument during the motions in this matter that no claim was really being asserted under Article VI, Section 3; and the court further finds even without that, even without that concession, that no such claim is sustained by the evidence in this case.

Article VI, Section 3, upon which this claim is predicated, is captioned To Invoke and Administer International Supervision and Other Peremptory Powers. This

provision is the provision that authorizes an International Union consistent with federal labor law to take draconian measures when there is evidence of corruption or financial malpractice or to assure the performance of collective bargaining agreements, or where there has been a break down of the democratic process in order to restore democratic process to the workings of the local union. There simply is no evidence in this case upon which this issue could be sustained in favor of the plaintiffs. There is no evidence of corruption. There is no evidence of financial malpractice. There is no evidence of the break down of democratic procedures. And there is no basis for a claim for a breach of contract under Article VI, Section 3.

And, accordingly, that claim will be dismissed.

Now the court has recited its findings in considerable detail because it

thinks it is important that people who invoke the federal judicial process understand the reason for the disposition of the case. There are always going to be disappointments in litigation, not everybody can win, and this simply is a case that the court has determined that is not sustained as a matter of law, and for the reasons that I have articulated at some length, I wanted you to understand why the court has disposed of the cases under Rule 50 and granted judgment as a matter of law.

You have served faithfully, you have been an attentive jury, and you have discharged your functions in this case and you have served a purpose. You were the forum before whom these parties came, and at the beginning of this case there was no certainty as to whether or not you would be called upon to do your duty as the judges of the facts. It turned out after the plaintiffs have fully submitted their case that it was a case for

the court to decide as the judge of the law. So I have gone into this detail for your benefit so you won't feel that you have served no useful purpose. You were the forum before whom the claim was made. It has been determined now that there is not a claim to submit to you. Now you are discharged and excused in this case. You are not excused from all future jury service, just in this case. And you have the appreciation of the court for your faithful attendance and attention. You have done your duty and you are excused. Thank you very much. Let the jury step out.

(Jury discharged.)

THE COURT: The clerk is directed to enter judgment consistent with the court's findings stated on the record. The clerk is also directed to let the judgment reflect the dismissal of the case as to Stauffer Chemical Company pursuant to the statement of counsel

on the record, that it is agreed that it was agreed that any liability in this case of Stauffer had been assumed by the Rhone-Poulenc defendants and, accordingly, the parties agreed to dismiss the Stauffer Chemical Company. Judgment will be entered.

I compliment the lawyers. Once we got started, you drove right to the heart of it and there was no wasted effort and it was presented in a lawyerlike fashion. You have the compliments of the court.

Thank you very much.

Adjourn court, Marshal.

(Proceedings adjourned at 10:20 AM.)

**IN THE UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

**JUDGMENT IN A CIVIL CASE**

| | |
|---|---|
| ALBERT AKINS, et al. | ) |
| | ) |
| | ) |
| vs. | )CASE #: 1-91-0134 |
| | ) |
| ICI AMERICAS INC., et al. | )JURY DEMAND |

The plaintiffs' action against the defendant, Stauffer Chemical Company, is dismissed with prejudice pursuant to the statement of counsel on the record at the hearing on October 19,1993.

The Court having granted the defendants' motions for judgment as a matter of law at the conclusion of the plaintiffs' case-in-chief, as stated on the record at the hearing on October 21, 1993, this action is, accordingly, dismissed with prejudice.

JULIET GRIFFIN, CLERK

/s SM
BY SUZANNE W. MATHERNE

DATE October 22, 1993

**UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**
**COLUMBIA DIVISION**

| | | |
|---|---|---|
| **ALBERT AKINS, et al.,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | **Civil Action No.** |
| **vs.** | ) | **1-91-0134** |
| | ) | **(Judge Higgins)** |
| **ICI AMERICAS, INC., et al.,** | ) | **(Jury Demand)** |
| | ) | |
| | ) | |
| **Defendants.** | ) | |

**ORDER**

It appearing to the Court that plaintiffs William Claude, Milton Knowles, and Michael Lindsey signed releases and waivers and received severance pay from the defendant, Rhone-Poulenc Basic Chemicals Co., in accordance with the holding in the Court's June 29, 1993 Memorandum Decision and Order, those Plaintiffs' claims against Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co. are hereby dismissed.

ENTERED this 27th day of October, 1993.

/s Thomas A. Higgins
UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:

/s William N. Ozier
William N. Ozier
Bennett L. Ross
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by United States Mail, postage prepaid, to Frank Steiner, Esquire, 214 Second Avenue North, Suite 203, Nashville, Tennessee, 37201-1644; to George Barrett, Esquire, 217 Second Avenue North, Nashville, Tennessee, 37201-1601; and to C. Dewey Branstetter, Esquire, 200 Church Street, Nashville, Tennessee, 37201, on this 22 day of October, 1993.

/s William N. Ozier
William N. Ozier

238247

**IN THE UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**COLUMBIA DIVISION**

| | | |
|---|---|---|
| ALBERT AKINS, et al. | ] | |
| | ] | |
| v. | ] | No. 1-91-0134 |
| | ] | Judge Higgins |
| ICI AMERICAS INC., et al. | ] | |

O R D E R

The Court has before it the plaintiffs' motion (filed October 28, 1993; Docket Entry No. 257) for new trial and the responses of the defendants, International Union (filed November 9, 1993; Docket Entry No. 259); Rhone-Poulenc, Inc., and Rhone-Poulenc Basic Chemicals Co. (filed November 10, 1993 Docket Entry No. 260) and Local Union 912 (filed November 15, 1993; Docket Entry No. 261).

After due consideration, the Court finds that the motion is not well taken and is hereby denied.

It is so ORDERED.

/s Thomas A. Higgins
Thomas A. Higgins
United States District Judge
12-29-93

No. 94-5132

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| ALBERT AKINS, ET AL., | ) | |
| | ) | |
| Plaintiffs-Appellants, | ) | |
| | ) | |
| TONY BROCK, ET AL., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| ZENECA, INC., ET AL., | ) | |
| | ) | |
| Defendants-Appellees. | ) | |

**BEFORE:** CONTIE, MILBURN and SILER, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing

has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s Leonard Green
Leonard Green, Clerk pe

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

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|---|---|---|
| ALBERT AKINS, et al., | ) | |
| | ) | |
| Plaintiffs | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| ICI AMERICAS, INC., | ) | |
| RHONE-POULENC, INC., | ) | |
| RHONE-POULENC BASIC | ) | Civil Action |
| CHEMICALS CO., STAUFFER | ) | No. 1-91-0134 |
| CHEMICAL COMPANY, | ) | (Jury Demand) |
| INTERNATIONAL UNION OF | ) | |
| OPERATING ENGINEERS, | ) | |
| AFL-CIO, and LOCAL UNION | ) | |
| NO. 912, INTERNATIONAL | ) | |
| UNION OF OPERATING | ) | |
| ENGINEERS, AFL-CIO, | ) | |
| | ) | |
| Defendants. | ) | |

## SECOND PRETRIAL ORDER

This case will be tried and presented to the Court in accordance with this Order, the pleadings in the cause being amended to comply therewith.[1]

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[1]This order is limited to the liability issues remaining after entry of the Court's Memorandum Decision of June 29, 1993, granting in part and denying in part the defendants' summary judgment motions. None of the parties waive any previous position on its respective claims or defenses by entering into this Second Pretrial Order.

1. THEORIES OF THE PARTIES

a. THEORY OF THE PLAINTIFFS In a Memorandum Agreement identified with the date of September 13, 1982, Plaintiffs were promised a one time transfer right to the Organic Plant if they were ever laid off from the Furnace Plant. The Memorandum Agreement of September 13, 1982 was a cross-bumping agreement between the two plants. The two plants agreed to the cross-bumping agreement in exchange for the employees' promise to consent to separate collective bargaining agreements for the two plants which in the past had been under a single collective bargaining contract. The employees, including Plaintiffs, fully performed their part of the bargain, and since 1982 the plants have been under separate collective bargaining contracts.

The 1982 agreement was executed by Stauffer Chemical Company and Local Union No.

912, International Union of Operating Engineers, AFL-CIO. Subsequently, both plants were sold by Stauffer Chemical Company and at this time, the Organic Plant is owned by ICI and the Furnace Plant is owned by Rhone-Poulenc.[2]

Rhone-Poulenc is a successor to Stauffer Chemical Company and bound by the 1982 and 1985 collective bargaining agreements for the Furnace Plant, including the cross-bumping agreement. The cross-bumping agreement has been continuously in, and remains in, the collective bargaining agreement for the Furnace Plant as expressly agreed to by Rhone-Poulenc in the 1988 and 1991 collective bargaining agreements.

In June of 1990, Rhone-Poulenc announced the closing of the Furnace Plant with layoffs to begin in February of 1991. ICI, who was

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[2]Herein, Rhone-Poulenc refers to both Defendants, Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co.

also a successor to Stauffer Chemical Company in relation to the Organic Plant, had agreed in 1988 to a collective bargaining agreement expressly incorporating and agreeing to the cross-bumping agreement. The 1988 collective bargaining agreement for the Organic Plant was scheduled to expire in June of 1991. Rhone-Poulenc postponed the layoffs until July of 1991.

In June of 1991, ICI and the Local Union representing the bargaining unit for the Organic Plant, agreed to delete the cross-bumping agreement from the collective bargaining contract for the Organic Plant. The new contract was not submitted to the bargaining unit for the Furnace Plant for approval nor was any member of that bargaining unit permitted to participate in the negotiations. The bargaining unit for the Furnace Plant, including the Plaintiffs, did not authorize, participate in or ratify the

negotiations of the June, 1991 contract for the Organic Plant.

The Furnace Plant has ceased production of phosphorus and Plaintiffs have been laid off or are facing layoff. Rhone-Poulenc has renounced and breached its contractual obligations to furnish Plaintiffs jobs at the Organic Plant under its collective bargaining agreements, including the cross-bumping agreement. Stauffer Chemical Company also breached its contractual obligations to Plaintiffs under the cross-bumping agreement.

The Local Union had a conflict of interest since 1982 in attempting to represent both bargaining units. To be able to collect dues from all employees in the face of such a conflict, the Local Union continually advised the Plaintiffs, up until June 11, 1991, the date of the new ICI contract, that the action of one bargaining unit could not affect the rights of the other bargaining unit. After

the approval of the June 11, 1991 contract, the Local Union changed its position and advised Plaintiffs that their rights had been terminated by the ICI bargaining unit.

Moreover, the Local Union refused to pursue a grievance against Rhone-Poulenc on behalf of Plaintiffs even though Rhone-Poulenc was clearly liable under its current collective bargaining agreement. The Local Union refused to pursue the grievance because if it won the grievance, it would injure the Organic Plant employees.

The Local Union breached its duty of fair representation to Plaintiffs. The Local Union further breached its contractual obligations to Plaintiffs under Section XXIV(11)(e) of the IUOE constitution which required the submission of the new June, 1991 ICI contract to the bargaining unit for the Furnace Plant for approval.

The International Union participated in the 1982, 1985 and 1988 negotiations and has had full knowledge of the conflict of interest situation since 1982. Moreover, by letter of June 26, 1990, the International Union was expressly apprised of the conflict of interest situation and requested, as authorized by Sections VI(2) and (5) of the IUOE constitution, to rule whether Section XXIV(11)(e) of the IUOE constitution would prohibit the bargaining unit of the Organic Plant negotiating away Plaintiffs' rights without the approval of the bargaining unit for the Furnace Plant. The International Union refused to act.

Again, on July 10, 1991, the International Union was fully apprised of the conflict of interest situation and the proposed grievances. The International Union was further informed on July 16, 1991 that the Local Union did not intend to pursue a

grievance against Rhone-Poulenc. Section VI(3) of the IUOE constitution authorizes the International Union to act to assure performance of collective bargaining agreements or other duties of a bargaining representative." Again, the International Union refused to act.

The International Union breached its contractual obligations to Plaintiffs under Section VI(2), (3) and (5) and XXIV(11)(e) of the IUOE constitution. The International Union and the Local Union were motivated by the conflict of interest situation and prejudicially favored the bargaining unit for the Organic Plant over the bargaining unit for the Furnace Plant.

b. **THEORY OF THE DEFENDANTS RHONE-POULENC, INC. AND RHONE-POULENC BASIC CHEMICALS CO.**

In September, 1982 the two facilities known as the Furnace Plant and Organic Plant located in Mt. Pleasant, Tennessee were both

owned by Stauffer Chemical Company ("Stauffer"). Prior to that time, all of the employees in both plants had been covered by the same collective bargaining agreement between Stauffer and Local 912 of the International Union of Operating Engineers ("Local 912"). In September of 1982, Stauffer agreed with Local 912 to divide the two plants into separate units for purposes of collective bargaining. Pursuant to that agreement Stauffer and Local 912 negotiated separate collective bargaining contracts for the two facilities which took effect in September, 1982. Stauffer and the Local Union also agreed to a separate memorandum agreement, which is actually undated but referred to in those contracts as the "September 13, 1982 Memorandum," which was incorporated by reference into both of those agreements. That Memorandum afforded certain employees of both plants, who had sufficient seniority and

skills, to "bump" or displace less senior employees in the other plant in the event of their lay off from either facility. Stauffer and Local 912 negotiated new contracts for both plants in 1985 which again incorporated the September 13, 1982 Memorandum. As the Court has already held, neither of those agreements has any continuing legal effect since both expired by their terms and were replaced by new agreements in 1988.

After a series of changes in ownership beginning in 1985, both facilities were owned in 1987 by ICI Americas, Inc. The defendant, Rhone-Poulenc, Inc. (hereinafter referred to as "RP") purchased the facility known as the Furnace Plant in Mt. Pleasant, Tennessee, and several other facilities unrelated to this action, from ICI Americas, Inc. (hereinafter referred to as "ICI") in December of 1987 by purchasing all of the stock of Stauffer. ICI retained ownership of the organic Plant and

certain other assets of Stauffer. The name of Stauffer Chemical Company was changed by RP to Stauffer Chemical Company Division of Rhone-Poulenc, Inc. in February of 1988 and, in September of 1989, the name was changed once more to Rhone-Poulenc Basic Chemicals Co. (hereinafter referred to as "RP Basic"). (The defendants RP and RP Basic are sometimes referred to herein collectively as "RP".)

Contrary to the position asserted by the plaintiffs, there is no longer any entity known as Stauffer Chemical Company. Through the acquisition of the Stauffer stock by RP and the subsequent name changes, Stauffer became RP Basic.

RP admits that the plaintiffs, and all of the other production and maintenance employees of the former Stauffer Chemical Company have been represented at all times material to this case by the defendant Local 912. Local 912 entered into a series of collective bargaining

agreements with Stauffer, and subsequently in 1988 and 1991 with ICI and RP Basic. The 1982 Memorandum which is the basis of the plaintiffs' claims was also incorporated by reference in the contracts entered into between ICI and Local 912 and between RP Basic and Local 912 in 1988. In June of 1991, after extensive negotiations, ICI and Local 912 reached agreement on a new contract which removed any reference to the 1982 Memorandum. That collective bargaining agreement took effect on June 11, 1991.

Since the plaintiffs had no "vested" transfer rights under the 1982 Memorandum, any right to transfer which the Plaintiffs may have had did not arise until they were actually laid off from the Furnace Plant after July of 1991. It is the position of the RP Defendants that once the Furnace Plant and the Organic Plant were owned by separate and independent corporate entities after December

of 1987, the 1982 Memorandum was no longer effective or binding on either ICI or the RP Defendants since neither company could force the other company to accept a transfer of its laid-off employees. Even if the 1982 Memorandum did continue to be binding on ICI and RP after 1987, the removal of the 1982 Memorandum from the ICI contract in June of 1991 ended any basis on which the plaintiffs may have had a claim to transfer to the ICI Organic Plant at the time of their layoffs by RP Basic. Once the 1982 Memorandum was eliminated from the ICI contract, ICI had no further obligation to accept the transfer of any of the plaintiffs and neither RP nor Local 912 had any way to force ICI to accept such transfers.

The RP Defendants assert that they performed any and all obligations which they had to the Plaintiffs under the 1988 collective bargaining agreement between RP

Basic and Local 912 which was in effect at the time of their layoffs in 1991. The RP Defendants assert that nothing contained in that 1988 collective bargaining agreement between RP Basic and Local 912, or in the 1982 Memorandum, constitutes an agreement by the RP Defendants to "furnish" the plaintiffs jobs at the Organic Plant owned by ICI and that there is no way that RP could have made such an agreement. The RP Defendants assert that whatever effect the 1982 Memorandum may have had at the time of the layoff of the Plaintiffs beginning in July of 1991, the sole obligation which the RP Defendants had under their own contract with Local 912 was to permit the Plaintiffs to transfer to the ICI Organic Plant when they were laid off by RP, or to accept the transfer of any employees with sufficient seniority and qualifications who might have been laid off from the ICI Organic Plant, displacing less senior Furnace

Plant employees. The RP Defendants deny that they "renounced" or breached any contractual obligations which they may have had to the plaintiffs but contend that they fulfilled their obligation to the plaintiffs by attempting to assist them in seeking to transfer to the ICI Organic Plant after they were laid off from the Furnace Plant beginning in July of 1991. When ICI refused to accept the plaintiffs, the RP Defendants assert that they had no ability to force ICI to accept the plaintiffs, nor could they have done so since, as the Court has now held, any obligation ICI may have had to accept them ended when the 1982 Memorandum was removed from the ICI contract with Local 912 in June of 1991.

The RP Defendants also contend that in order for any of the plaintiffs to assert any contractual right to transfer against them, they must show that they exhausted the grievance and arbitration procedure contained

in the contract between RP Basic and Local 912. Since only four of the plaintiffs filed a grievance under that contract, only those four individuals can raise the claim in this action that the RP Defendants breached a contractual obligation to them. The RP Defendants responded to that grievance by offering to assist the four grievants and any other employees being laid off from the Furnace Plant in attempting to transfer to the Organic Plant. After receiving the company's response to that grievance, and with advice of its attorney, the local union discontinued any further processing of that grievance. RP never refused to process the grievance or refused a request to arbitrate the grievance since no such request was made by Local 912.

The RP Defendants also assert that in the negotiations between RP Basic and the defendant Local Union in October of 1988--the first negotiations between RP and the union

after RP's purchase of the Furnace Plant -- the parties agreed to a memorandum dated October 13, 1988 which clarified that RP Basic had no obligation to take any affirmative action to try to assist any of its employees, including the plaintiffs, in attempting to transfer to the ICI Organic Plant under the 1982 Memorandum. That October 13, 1988 Memorandum, which was also incorporated by reference in the 1988 and 1991 contract between RP and Local 912, provided that in the event of a layoff of its employees, including the plaintiffs, the sole obligation of the RP Defendants was to follow the terms of the collective bargaining agreement then in effect between RP Basic and Local 912, or the terms of the 1982 Memorandum as incorporated in that contract. The RP Defendants assert that they complied fully with all of such provisions and had no further obligation to the Plaintiffs once they had been laid off by RP Basic. The

Plaintiffs have no valid claim against RP because of ICI's justified refusal to accept their transfer requests.

The RP Defendants also assert that neither the defendant International Union nor the defendant Local Union breached any duty which either of those entities had to represent the plaintiffs fairly and that barring such breach of the duty of fair representation by one or both of the union defendants, the plaintiffs can assert no claim for breach of the terms of the collective bargaining agreement between RP and Local 912 against the RP Defendants.

c. THEORY OF THE DEFENDANT, LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS.

By order dated 6/29/93, this Court has granted judgment as a matter of law to Local 912 on all claims by any plaintiff under the LMRDA (29 U.S.C. § 411), all pendent state law claims and all but one Section 301 claim under

the LMRA. Therefore, these matters are no longer before the Court and evidence thereon is not admissible at trial.

There are two claims against Local 912 which have not been dismissed by the Court: (1) The claim that Local 912 breached its duty of fair representation; and (2) The claim that Local 912 breached Section XXIV(11)(e) of the IUOE constitution.

Plaintiffs allege only two specific actions as violations of the duty of fair representation: (1) That the union breached its duty by not preventing the separate bargaining unit's negotiating committee at ICI from approving its own 1991 contract, which contract did not include the 1982 Memorandum of Understanding; and (2) That the union breached its duty by not pursuing a grievance filed by four of the plaintiffs against Rhone-Poulenc to the fourth and final grievance stage even though the union had determined

that all possible remedies were had at the third stage.

Concerning the contract claim, it is the position of Local 912 that plaintiffs cannot establish a violation of the constitution as Local 912 complied with the proviso contained in the very sentence which plaintiffs allege to have been violated. Article XXIV(11)(e) provides for contract approval "by the membership affected", then continues with an express exception to that requirement:

> ... membership affected, provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership.

Local 912 denies that the plaintiffs, members of the Rhone-Poulenc bargaining unit, qualify as members affected by a contract covering employees in the separate ICI bargaining unit. However, even if these plaintiffs are considered members affected,

the union complied with the express grant of the constitutional provision by delegating to a bargaining committee the authority to approve such contract "without such submission of the same to vote of its membership." Plaintiffs can never establish a violation of a contract provision where the local union has complied with an exception expressly stated in the words of that contract provision. Plaintiffs have failed to state and under the admitted facts can never prove a Section 301 claim for violation of Article XXIV(11)(e) of the IUOE constitution.

It is also the position of Local 912 that the plaintiffs cannot establish a breach of the duty of fair representation as to the two categories alleged, contract negotiations involving another bargaining unit and a grievance resolution in the plaintiffs' bargaining unit.

Plaintiffs, members of the Rhone-Poulenc bargaining unit, have alleged that Local 912 breached its duty of fair representation to them by allowing employees of a separate corporation, ICI, to delete the 1982 memorandum from ICI's contract which covered only ICI's separate bargaining unit. As a matter of law, this allegation does not constitute a breach of the duty of fair representation. It is an undeniable fact that Local 912 owed the duty of fair representation to its ICI bargaining unit. It is further undisputed that the ICI employees wanted the memorandum taken out of their contract because they did not want anything in their contract which might allow the employees of the closing Rhone-Poulenc plant to take their jobs. The mere fact that Local 912 represents another unit, ICI, which exercises its conceded right to bargain for and accept a contract which protects its own unit's jobs, does not state a

breach of the duty to a different unit. To hold otherwise would constitute a requirement that Local 912 breached its duty as to its ICI unit in order to fulfill an alleged duty to plaintiff's unit. Federal labor law neither recognizes nor countenances such a requirement. Plaintiffs have conceded that they had no right to vote on the provisions of the contract for the other bargaining unit, ICI.

In addition to there being no legal basis for plaintiffs' fair representation claim, there is also no factual basis because Local 912 did not have the authority to determine what contract clauses went into the ICI contract. The members of Local 912 at ICI had a bargaining committee which was empowered by the constitution to negotiate for and accept a contract with ICI on behalf of the bargaining unit employees at ICI. Officials of Local 912 were not voting members of that

bargaining committee. When the company, ICI, proposed to delete the memorandum from the ICI contract, the ICI bargaining committee was the only entity which could accept or deny that company proposal. Because the ICI employees had already expressed their desire to delete that memorandum in order to protect their own jobs, the ICI bargaining committee exercised their authority to agree to that deletion. As plaintiffs have conceded, there was nothing Local 912 could do to stop the negotiating committee from agreeing to remove that provision from the 1991 ICI contract. Local 912 cannot be found to have acted arbitrarily, capriciously or in bad faith when in fact the Local had no power to act at all. Under duty of fair representation law and the facts conceded by plaintiffs, plaintiffs have failed to state a claim for breach of the duty of fair representation concerning another unit's contract.

Neither do plaintiffs state a breach of the duty of fair representation in their claim that Local 912 did not obtain the relief desired by the four Rhone-Poulenc employees who filed the grievance against their employer. Plaintiffs have conceded that the union processed this grievance through all three steps of the grievance procedure and that the grievance was discontinued only at the fourth and final step. The grievance was an attempt to compel Rhone-Poulenc to force another company, ICI, to hire the employees of Rhone-Poulenc who had been laid off. The facts of this case reveal that Rhone-Poulenc resolved this grievance by implementing the procedures available to it to place laid off Rhone-Poulenc employees at ICI. Because Rhone-Poulenc had done everything within its power to accomplish what the grievance demanded, and because counsel advised Local 912 that nothing further in fact could be

done, Local 912 determined that the grievance was resolved at the third step, thereby withdrawing it from further-processing.

Under the facts admitted by all parties in this case, plaintiffs cannot meet their burden in the duty of fair representation charges to show that the union's actions, viewed from the legal and factual setting in which they occurred, were so far outside a wide range of reasonableness as to be irrational. It is not the burden of Local 912 to establish that its actions were rational but the proof requirements of the plaintiffs to establish that the actions of the union were so far outside a wide range of reasonableness as to be irrational. This the plaintiffs cannot establish and their case should be dismissed.

It is Local 912's position that since plaintiffs cannot establish a breach of the duty of fair representation, their entire duty

of fair representation/§ 301 case must fail. It is also Local 912's theory that whether or not a breach of the duty of fair representation is proved against it, the plaintiffs cannot establish a breach of the contract with Rhone-Poulenc defendants. Failure to establish a breach of contract as a matter of law requires dismissal of both the breach of contract action and its hybrid partner, the duty of fair representation case.

d. **THEORY OF THE DEFENDANT INTERNATIONAL UNION OF OPERATING ENGINEERS.**

The defendant, International Union of Operating Engineers, AFL-CIO (hereinafter referred to as the "International"), is a labor organization pursuant to 29 U.S.C. § 402. The Court has already held that:

(1) the International is a separate body from Local 912;

(2) the International is not the bargaining representative of the plaintiffs;

(3) the International does not owe a duty of fair representation to the plaintiffs;

(4) the International did not participate in or ratify any of the representation by Local 912 complained of by plaintiffs;

(5) the International did not tortiously interfere with any contract entered into by plaintiffs; and

(6) the International did not conspire with any of the defendants.

The remaining causes of action against the International are whether the General President of the International violated the constitution when he responded to Local 912 Business Manager Kincade's letter of June 26,

1990 and whether the General President violated the constitution when he responded to two of the plaintiffs' letter dated July 12, 1991.

The International admits that the business manager of Local 912 requested an interpretation of the International's constitution in his letter dated June 26, 1990. The General President of the International is empowered under Article VI, Section 2 of the International Constitution to interpret the Constitution. Specifically, the Business Manager described a memorandum of agreement which had been in effect for some time and which was then contained in separate collective bargaining agreements IUOE Local 912 had with ICI Americas and Rhone-Poulenc, Inc., respectively, covering separate groups of employees. The Business Manager asked whether either separate group of employees could do away with the memorandum, since in

his opinion "the Membership Affected includes both entities."

The Business Manager's Letter requested the General President's interpretation of Article XXIV, Subdivision 11, Section (e) of the International Constitution. That section of the Constitution states that "Proposed collective bargaining agreements and modifications thereof" are to be approved by the "membership affected", provided that a Local Union "may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership." In his response, the General President stated that, because the memorandum of agreement was in effect and there was no currently proposed modification to that memorandum or to either agreement, there was no need to determine "at this time" what set of members constituted the

"membership affected" that would be entitled to vote on a proposed modification of that agreement.

The General President's response that the question was not ripe for a decision was proper under the circumstances. After the Local Business Manager's request in 1990, neither he nor any other member of Local 912 requested an opinion of the General President at any point when there was an actual proposed modification of the memorandum under consideration. Moreover, under the authority granted Local 912 under the proviso to Article XXIV, Subdivision 11, Section (e), Local 912 had delegated the authority to approve modifications to the agreements to the bargaining committees for each unit. Hence, members in neither bargaining unit had any right, under the International Constitution, to vote on the modification, without regard to whether or not they were considered to be the

"membership affected" by the proposed modification. Thus, the General President's response to Local 912's Business Manager did not constitute a violation of the International Constitution by the International Union.

The International denies that it violated Article VI, Section 3 of the Constitution in its response to two of the plaintiffs' 17 letter. After receiving the plaintiffs' letter, the General President requested a report from the Local 912 Business Manager on the items discussed in the letter. Upon receiving the report, the General President responded to the plaintiffs, stating that since the International was not a party to any of the agreements mentioned by the plaintiffs, the International was without authority to alter or amend the terms of the agreement or intervene in the manner described in their letter. This response complied with the

General President's usual practice when he is asked to intervene in a local collective bargaining matter.

The General President's response to the plaintiffs' letter was entirely proper. Specifically, the International did not have the authority to simply force Local 912 to process the grievance mentioned in the plaintiffs' letter. Under Article VI, Section 3 of the International Constitution, the General President does have the authority, under certain enumerated circumstances, to place a Local Union under International supervision (trusteeship), thereby suspending the Local's autonomy entirely and completely taking over the operation of the Local's affairs. Before exercising this authority, the Constitution requires, in all but emergency circumstances, that a hearing be held with reasonable notice to officers and members of the local involved. The authority

to place a Local Union under trusteeship is discretionary authority and, even if the conditions described in the Constitution for exercising this discretionary authority are met, there is absolutely no mandatory obligation under the Constitution for the General President to exercise this authority.

No plaintiff ever suggested that Local 912 should be placed under trusteeship, nor did President Hanley consider such. Even if the letter of July 12, 1991 from two of the plaintiffs could be considered an appeal to the General President to place Local 912 under trusteeship, such letter did not meet the requirements of the Constitution to place Local 912 under trusteeship, nor did the conditions at Local 912 satisfy the strict requirements for placing a local union under trusteeship as provided in 29 U.S.C. § 462 and in the International Constitution.

Federal law does not favor trusteeships, as can be seen from 29 U.S.C. § 462 which states:

> Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

The International can place a local union under trusteeship only after complying with the federal statute and the rules and regulations of the Secretary of Labor made pursuant to federal law, which include the holding of a hearing prior to imposing such trusteeship.

Not only did the conditions at Local 912 not warrant the imposition of a trusteeship,

the General President is given great discretion by the International Constitution in the execution of his powers and Article VI, Article 3 of the International Constitution specifically states that:

> Failure of the General President to exercise the authority vested in him under this section shall not in itself be considered as authorization for, or ratification or condonation of, any act or failure to act on the part of any Local Union or other subdivision of the International Union, or their officers, employees, members or agents.

Thus, the General President's response to the plaintiffs' letter was entirely appropriate and did not constitute a breach by the International Union of the International Constitution.

2. **ISSUES**

a. **AGREED STATEMENT OF LEGAL ISSUES**

1. Whether Local Union 912 breached its contractual obligations to

Plaintiffs under Section XXIV(11)(e) of the IUOE constitution.

2. Whether the International Union breached its contractual obligations to Plaintiffs under Section VI(3) of the IUOE constitution.

3. Whether the International Union breached its contractual obligations to Plaintiffs under Section VI(2) of the IUOE constitution.

b. DEFENDANTS' PROPOSED ISSUES

1. Whether Rhone-Poulenc breached contractual obligations to Plaintiffs under the 1988 and 1991 collective bargaining agreements for the Furnace Plant.

2. Whether the Defendant, Local Union 912, breached its duty of fair representation to Plaintiffs under the 1988

and 1991 collective bargaining agreements between Rhone-Poulenc and Local 912.[3]

c. **PLAINTIFFS' PROPOSED ADDITIONAL ISSUES.**

The parties have been unable to agree with the following additional issues proposed by the plaintiffs. By signing this order the defendants assert that the issues are as stated in Sections 2a and 2b and do not agree to the inclusion of the issues in this section 2c which are left for the court to resolve at the pretrial conference.

1. Whether Rhone-Poulenc breached contractual obligations to Plaintiffs under the 1988 and 1991 collective bargaining agreements for the Furnace Plant and under the September 13, 1982 memorandum agreement.

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[3]These issues were agreed to on Friday, September 24, 1993 in a meeting of the attorneys for the parties. By fax sent on Monday, September 27, plaintiffs' attorney proposed changes to the issues which are set forth in plaintiffs' proposed issues.

2. Whether the Defendant, Local Union 912, breached its duty of fair representation to Plaintiffs under the applicable collective bargaining agreements and under the memorandum agreement of September 13, 1982.

3. Whether Stauffer Chemical Company breached contractual obligations to Plaintiffs under the applicable collective bargaining agreements and under the memorandum agreement of September 13, 1982.

4. Whether defendant International Union breached its contractual obligations to plaintiffs under Sections VI(5) and XXIV(11)(e) of the IUOE Constitution.

3. **OTHER MATTERS**

a. Counsel have complied with the requirements of Local Rule 11 as to witnesses, exhibits and stipulations. Copies of Proposed Witness Lists are attached. The parties stipulate to the authenticity of all exhibits.

b. The first phase of this trial will be limited to liability issues pursuant to the Agreed Order of bifurcation.

ENTERED this 30th day of September, 1993.

Any statement of the issues in this order are subject to the Court's memorandum and order of July 29, 1993, which shall govern the trial of this case. TAH

/s Thomas A. Higgins
THOMAS A. HIGGINS
UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:

STEINER & STEINER

BY: _____

Frank Steiner
Attorney for Plaintiffs
214 Second Avenue North
Suite 203
Nashville, Tennessee 37201-1644
615/244-5063

BASS, BERRY & SIMS

BY: /s William N. Ozier
William N. Ozier
Attorneys for Rhone-Poulenc, Inc.
and Rhone-Poulenc Basic Chemicals Co.
2700 First American Center
Nashville, Tennessee 37238
615/742-6232

BRANSTETTER, KILGORE, STRANCH & JENNINGS

BY: /s C. Dewey Branstetter, Jr.
C. Dewey Branstetter, Jr.

BY: /s Jane B. Stranch
Jane B. Stranch
Attorneys for Local Union 912,
the International Union of
Operating Engineers
200 Church Street
Nashville, Tennessee 37201
615/254-8801

BARRETT, JOHNSTON & PARSLEY

BY: /s George E. Barrett
George E. Barrett

BY: /s Phillip A. Purcell
Phillip Purcell
Attorneys for International
Union of Operating Engineers,
AFL-CIO
217 Second Avenue North
Nashville, Tennessee 37201-1601
615/244-2202

**IN THE UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**COLUMBIA DIVISION**

| | |
|---|---|
| ALBERT AKINS, ET AL., | ) |
| | ) |
| Plaintiffs, | ) |
| | ) |
| v. | ) CIVIL NO.1-91-0134 |
| | ) (JUDGE HIGGINS) |
| ICI AMERICAS INC., ET AL., | ) JURY DEMAND |
| | ) |
| Defendants. | ) |

**MOTION OF GENEVA WIGGINS TO JOIN THIS ACTION AS A PLAINTIFF**

Geneva Wiggins respectfully moves the Court to permit her to join this action as a party/plaintiff. Her Consent to Join is attached hereto. Her situation is the same as the Plaintiffs herein and she has the same claims they have.

Paragraph (b) of the Scheduling Order provides that Motions for Joinders shall be filed by June 1, 1992, except for joinders authorized by the Court, if any, in response

to Plaintiffs' Motion to Notify Class Members.[1] Since Ms. Wiggins' claims are identical to the claims of the present Plaintiffs, there would be no prejudice in permitting the joinder at this date.

Respectfully submitted,

STEINER & STEINER

BY: /s Frank Steiner
Frank Steiner
Attorney for Plaintiffs
TN Supreme Court No. 3600
214 Second Avenue North
Suite 203
Nashville, TN 37201-1644
(615) 244-5063

**ORDER**

Motion granted and Ms. Wiggins is herewith deemed a party plaintiff.

/s Thomas A. Higgins
USDJ/7-23-92

[1]The Motion is primarily under the ADEA and Plaintiffs have moved to dismiss the ADEA claims. However, the Plaintiffs and the other employees also comprise a Rule 23 class.

**IN THE UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**COLUMBIA DIVISION**

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| ALBERT AKINS, ET AL., | ) |
| | ) |
| Plaintiffs, | ) |
| | ) |
| v. | ) CIVIL NO.1-91-0134 |
| | ) (JUDGE HIGGINS) |
| ICI AMERICAS INC., ET AL., | ) JURY DEMAND |
| | ) |
| Defendants. | ) |

**PLAINTIFFS' MOTION TO AMEND TO DISMISS AGE DISCRIMINATION CLAIMS**

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, Plaintiffs respectfully move to amend to dismiss the age discrimination claims.

Respectfully submitted,

STEINER & STEINER

BY: /s Frank Steiner

Frank Steiner
Attorney for Plaintiffs
TN Supreme Court No. 3600
214 Second Avenue North
Suite 203
Nashville, TN 37201-1644
(615) 244-5063

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing Motion for Amend to Dismiss Age Discrimination Claims has been mailed, postage prepaid, to Cary Schwimmer, Esq., Young & Perl, P.C., 2380 One Commerce Square, Memphis, Tennessee 38103, William N. Ozier, Bass, Berry & Sims, 2700 First American Center, Nashville, Tennessee 37238, C. Dewey Branstetter, Jr., Esq., Branstetter, Kilgore, Stranch & Jennings, 200 Church Street, Nashville, Tennessee 37201 and to George E. Barrett, Esq., Barrett, Johnston & Parsley, 217 Second Avenue North, Nashville, Tennessee 37201-1601, this 5th day of May, 1992.

/s Frank Steiner
Frank Steiner

**ORDER**

Motion granted and all claims of age discrimination are dismissed.

/s Thomas A. Higgins
Thomas A. Higgins
USDJ/8-28-92

91053M18

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

| | | |
|---|---|---|
| ALBER AKINS, et al. | ] | |
| | ] | |
| v. | ] | No. 1-91-0134 |
| | ] | Judge Higgins |
| ICI AMERICAS INC., et al. | ] | |

O R D E R

The Court has before it the motion (filed March 19, 1992; Docket Entry No. 70) of plaintiffs to notify class members, together with an amended form (filed September 2, 1992; Docket Entry No. 124) of notice.

Also before the Court are motions of Stephen Harville (filed August 18, 1992 Docket Entry No. 114?, Erma Fitzgerald (filed August 27, 1992; Docket Entry No. 117), Sylvester Kirk, Jr. (filed September 2, 1991; Docket Entry No. 123), and Robert D. Dawson (filed September 4, 1992; Docket Entry No. 128) to join this action as additional parties.

This is not a class action. The plaintiffs have not alleged the prerequisites

to a class action, as set forth in Federal Rule of Civil Procedure No. 23(a), nor have they complied with Local Rule of Court No. 15. Accordingly, the plaintiffs' motion to notify class members is denied.

The scheduling order (entered February 28, 1992; Docket Entry No. 59) requires that motions for joinder of parties be filed by June 1, 1992. The above-listed motions to join were all filed well after that date. The movants have not shown cause why the deadline should be extended, as required by Federal Rule of Civil Procedure No. 6(b). Accordingly, the above-listed motions to join are denied.

It is so ORDERED.

/s Thomas A. Higgins
Thomas A. Higgins
United States District Judge
6-28-93

**IN THE UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**COLUMBIA DIVISION**

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|---|---|
| ALBERT AKINS, ET AL., | ) |
| | ) |
| Plaintiffs, | ) |
| | ) |
| v. | ) CIVIL NO. 1-91-0134 |
| | ) (JUDGE HIGGINS) |
| ICI AMERICAS INC., | ) |
| ET AL., | ) JURY DEMAND |
| | ) |
| Defendants. | ) |

**MOTION TO REVIVE ON SUGGESTION OF DEATH OF PLAINTIFF, TERRY THOMASON**

Kathy G. Thomason states she is the widow of the Plaintiff, Terry Thomason, who died on September 30, 1993, and she has qualified as the Administratrix of his estate. (Certified copy of order appointing her Administratrix is attached.) Accordingly, Kathy G. Thomason moves the Court to revive his action in this matter in her name pursuant to T.C.A. §§ 20-5-102 and 20-5-106.

Respectfully submitted,

/s Frank Steiner
Frank Steiner #3600

Attorney for Plaintiffs
STEINER & STEINER
214 Second Avenue North
Suite 203
Nashville, TN 37201-1644
(615) 244-5063

**ORDER**

Motion granted and the administratrix is so substituted.

/s Thomas A. Higgins
Thomas A. Higgins
USDJ/10-27-93

## LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

**29 USCA § 185, Suits by and against labor organizations**

**(a) Venue, amount, and citizenship**

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

**(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments**

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this

chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers

or agents are engaged in representing or acting for employee members.

**(d) Service of process**

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

**(e) Determination of question of agency**

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

NOTICE OF INTENT

The Memorandum of Agreement, dated 09/11/82, between the Company and the Union, states in part:

2. Employees shall first exhaust their rights under the layoff procedures described in the collective bargaining agreement covering the plant to which they are assigned.

3. Employees of either plant covered by this memorandum of Agreement who are to be laid off from their plant may then displace junior employees in the other plant provided that:

   a. the employee displaced shall be the junior employee in the classification.

   b. The employee must qualify for such classification after a reasonable training period at the Organic Plant or a period of fifteen (15)

working days or less at the Furnace Plant. If the employee fails to qualify, he will not be allowed to make further choices of jobs, but rather will be laid off.

4. Employees who elect to move from one plant to another will become an employee of the plant to which they have moved and will have no further rights to return to the other plant.

5. Employees who are given the opportunity to exercise their rights under this Memorandum of Agreement and who decline to do so shall forfeit future rights under this Agreement.

I have read the provisions outlined above and elect to do the following:

Check one:

____ I waive my rights to move to the Organic Plant.

____ I hereby exercise my rights to move to the Organic Plant.

_____
Signed Date

_____
Witness

(LOGO)

INTER-OFFICE CORRESPONDENCE Houston-212

TO: LOCATION: Shelton

FROM: G. L. Suydam 9/13/88

ATTENTION: J.P. Tullsen

SUBJECT: Cross Bumping Agreement

COPY TO: D. T. Sutton

RECEIVED

SEP 14 1988

HUMAN RESOURCES

I reviewed the cross bumping agreement with Bob Stringer, Personnel Manager at the ICI plant. He was very helpful and knowledgeable.

- The applicable agreement is the one which was reviewed by M. M. Pattillo. A second agreement pertaining to Tapper's 1st Helper or Proportioning Man is not applicable. According to Stringer,

the fourteen employees involved in the second agreement have all either exercised or waived their rights.

- The affected employees are more numerous than I imagined. Bob prepared the list attached 10/9/87. It is a combined seniority list of the two plants which showed 154 furnace plant employees and 117 organic plant employees as potentially having the seniority described in the agreement. On today's Furnace Plant Seniority list there remain 135 employees with the seniority described in the agreement.

This list was compiled by Stringer, discussed and confirmed at the time

with Lorne O'Connor, former Furnace Plant Personnel Manager and kept as a confidential internal document at the organic plant.

- I have tried to analyze four positions relative to this problem.

  1. Do nothing -- This position relies on the two principles that neither company considers the cross bumping agreement as enforceable and if contested the resolution of the problem will be smaller in the future than it will be today. As we have discussed, the liability, if any, rests with the Company that lays off and cannot force the remedy of the

Agreement on the opposite Company. Therefore, our worst case scenario would be a plant closure. In that scenario we would have to give the newly legislated 60-day notice, negotiate terms for closing and also negotiate resolution to the cross bumping agreement. In that we would not be able to provide the jobs it calls for, a monetary solution would likely result either through negotiation, arbitration or litigation.

2. Negotiate the Agreement out - - If the cross bumping agreement represents a significant liability to the

Company it then must also represent a significant asset to the employees. We must be resolved to make a monetary offer or severance arrangement to compensate this difference if negotiations are to be successful.

3. Negotiate and fail - pre strike -- If the Company raises the issue and capitulates as ICI did in January, we will have reduced our future argument that the agreement cannot be enforced. ICI verbally disclaimed their acquiescence but nevertheless signed the existing agreement.

4. Negotiate and Strike -- If the parties cannot make an agreement because of differences over this issue and a strike ensues, we will have to resolve these issues to end the strike or survive the strike. Resolving these issues while at strike might pose the same considerations as would be present under number one Do nothing if it ever occurred, except we will face the maximum liability. Surviving the strike would require an indefinite unilateral operation of the plant.

Recommendations

1. Do nothing

2. If we are not comfortable with doing nothing, I would propose to resolve the problem by having the union resolve to our satisfaction several questions about these agreement. This position is short of all or nothing and allows that we do owe something, perhaps severance pay for those affected employees.

a. What would the union have us to do if we are ever required to administer this agreement?

b. Do employees in the respective plants still earn seniority in the

opposite plant or does their seniority diminish one year for each year that passes?

c. Does the Union expect us to displace our own employees with employees of ICI if ICI lays off employees?

d. Would the Union negotiate away their perceived right to go to the organic plant in full or partial exchange for our agreement not to displace them with laid off ICI employees?

GLS/jfb

(LOGO)

June 26, 1990

Mr. Frank Hanley, General President
International Union of Operating Engineers
1125 17th Street, N. W.
Washington, D. C. 20036

Dear Sir and Brother:

Re Article IV. Section 2, Page 21 of IUOE's CONSTITUTION - Interpreting the Provisions of the Constitution and Deciding Questions of Law arising thereunder.

The following information is lengthy and rather complex, but the information is, I feel, necessary for you to consider in rendering your decisions under IUOE's

Constitution as to the questions I shall later ask.

In 1937 Victor Chemical Company built a plant in Mt. Pleasant, Tennessee to produce elemental phosphorus. The work force was small but grew as the plant prospered.

In the early 1940's, IUOE's Local 660 located in Florence, Alabama, organized the plant and negotiated a contract.

Union Carbide built a plant in Columbia, Tennessee in the early '40s, and Local 660 organized it also.

The members at Victor and Union Carbide sought their own Union, separate and apart from Local 660, thus Local Union 912 was charted July 1, 1945.

In the early 1950s, Stauffer Chemical Company bought Victor Chemical Company. In the late 1950s, the agricultural division of Stauffer built a small "organic" plant behind the elements phosphorus plant (Furnace Plant) and began a small operation making intermediates for herbicides, pesticides, and insecticides. The work force for the Organic Plant came out of the Furnace Plant's work force and was, therefore, under the same contract as was the Furnace Plant with Local 912.

The Furnace plant (elemental phosphorus) grew to a work force number of about 250. The Organic plant grew to about 125. Each Plant had its own plant manager, but a common personnel manager. That is, the personnel manager serviced both plants and did the hiring and contract administration with the respective plant manager. Later the Organic Plant did hire a personnel manager for its

plant but at that time both plants - the Furnace plant and Organic Plant - were still under the same contract with Local 912.

In the early 1960s, Local 912, IUOE, organized the Globe Washer Plant that belonged to Stauffer Chemical Company. Some 20-30 workers were involved. Their job WSA to wash the matrix (raw ore) to separate the dirt from the phosphate sand. Although the Globe Plant is being shut down, and the workers will lose their jobs, the Globe plant is not involved in the controversy that I need guidance on.

Prior to the separation of the Furnace Plant and the Organic Plant, and prior to the Furnace Plant's work force exceeding the Organic's, the membership at the plants negotiated a split committee consisting of four (4) members from each plant (Furnace and Organic) to the Negotiating Committee.

In the negotiations in September of 1982 for a new contract, Stauffer took a firm position that it was going to separate the two plants, the Furnace and Organic, and have a separate contract for each plant, since they were under two different divisions of the Company - the Chemicals Division at the Furnace plant (elemental phosphorus) and the Agricultural Division at the Organic Plant.

Since the Organic plant was staffed primarily from the Furnace plant, there was a major concern among each committee at each plant, about "bumping or rolling" between each plant in case of a reduction in force. The parties thus negotiated a "Memorandum of Agreement" and made it a part of each plant's contract, by reference, (See the included Memorandum) for those employees hired prior to September 11, 1982.

At least one employee, and possibly two others have moved under the Memorandum from the Organic plant to the Furnace plant while Stauffer still owned both plants.

In 1985 Stauffer Chemicals was purchased by Chesebourgh - Ponds. When Local 912 negotiated the Furnace and Organic plants - now separated- two strikes ensued. The Furnace plant was on strike about thirty (30) days, and the Organic plant about fifty (50) days.

The Memorandum of Agreement to bump between the two plants was continued in each contract.

In 1986 Cheseborough - Ponds sold the heretofore Stauffer plants to Unilever Corporation.

In the latter part of 1986, Unilver sold the Stauffer plants to ICI Americas Inc.

ICI's interest was primarily the Organic plant. ICI then sold the basic chemicals plants, which included the Furnace plant and the Globe Washer plant, plus a plant in Nashville to Rhone-Poulenc, Inc., in early 1987.

Local 912 then had the ICI (Organic) plant under a contract, and the Furnace plant (Elemental Phosphorus) under a separate contract. Both contracts still contained the Memorandum of Agreement to bump to the other plant.

In June 1988, Local 912 negotiated a three-year contract with ICI Americas - the old Stauffer Organic plant. ICI tried to negotiate out the Memorandum of Agreement.

The Union would not agree to let them. The company's final position was that the Company would not honor the Furnace Plant's employees bumping to the ICI (Organic) plant. The Memorandum of Agreement was left in ICI's Organic plant Contract. The Union's position was that unless and until the Memorandum was negotiated out at both affected plants - the Furnace and Organic - the Agreement was still valid and, Organic (ICI) employees could bump to the Rhone-Poulenc's Furnace Plant when applicable.

When Local 912 negotiated the Furnace plant contract in 1988 with Rhone-Poulenc, the Furnace plant Management wanted to delete the Memorandum of Agreement. Again the Local was successful in keeping the right of the Furnace plant employees to bump to ICI's Organic plant.

On Monday, June 18, 1990, Rhone-Poulenc's Manager of Employee Relations, Lee Suydam, called me and informed me the Company would be announcing the next day the shut down and cessation of operation of the Globe Washer plant and the Furnace plant to the respective plant's employees. (copies of Local Newspaper announcements enclosed.)

The dilemma that Local 912 now has is that two separate entities, each with a contract with Local 912, has a contractual right to "bump" into the other plant as a last resort. The end result thus will be that those with enough seniority at Rhone-Poulenc's Furnace plant will by the Memorandum of Agreement bump or roll those less senior at ICI's Organic plant. ICI's employees will then be laid off.

The fact that this has created much controversy is an understatement. ICI's

employees are very disgruntled and will probably try, encouraged by their Management, to negate and nullify the Memorandum of Agreement that permits Rhone-Poulenc's employees to bump them.

There is no question in my mind that either ICI's or Rhone-Poulenc's employees can, by following the proper procedure, negotiate away their Unit's right to go to the other plant. This was my position in the 1988 Negotiations at each Company. However, my position in the 1988 Negotiations was that neither Unit acting alone could negate or nullify the other Unit's right to exercise the bump or roll created by the Memorandum of Agreement negotiated in 1982, that this would have to be done jointly.

My questions to you for your interpretation of IUOE's Constitution under Article XXIV, Subdivision II, Section (e), page 105, is:

Can either ICI's employees or Rhone-Poulenc's employees, two separate entities under two separate contracts, now, acting alone, negotiate away the other entities rights under the Memorandum of Agreement dated September 13, 1982? If not, must there be a joint venture or negotiations to modify, negate or nullify the Memorandum, since the Membership affected includes both entities?

Local 912 is on the "horns of a dilemma," and a "damned if we do, damned if we don't situation."

From a logical standpoint, Rhone-Poulenc's employees, and 912's members, which is a larger Unit than ICI's, will not modify or relinquish its right to bump or roll ICI's employees, and in all probability will not even agree to a joint negotiations.

On the other hand, ICI's employees, also 912's members under a separate contract and a much smaller unit, (125 versus 280) goaded by ICI's Management, will in all probability try everything possible to frustrate, circumvent, and/or prevent Rhone-Poulenc's employees from bumping them.

I appreciate your interpretation and counsel in this matter.

Fraternally,

/s James B. Kincade
James B. Kincade
Business Manager

JBK/fr

July 27, 1990

Mr. James B. Kincade
Business Manager
IUOE Local Union No. 912
111 Nashville Highway
Columbia, TN 38401

Dear Sir and Brother:

Reference is made to your June 26, 1990 letter to me concerning a memorandum of agreement contained in two collective bargaining agreements IUOE Local Union No. 912 has at separate plants, one owned by ICI Americas Inc. and the other owned by Rhone-Poulenc, Inc. The memorandum of agreement gives employees at each plant the right to bump or roll employees at the other plant under certain circumstances. Apparently, one of the Plants is scheduled to be closed and

questions have arisen about the rights of the employees under the terms of the memorandum of agreement. You request my interpretation of Article XXIV, Subdivision 11, Section (e) of the International Constitution as to which employees should be allowed to vote on the resolution of these questions.

Article XXIV, Subdivision 11, Section (e) provides, in pertinent part, that:

> Proposed collective bargaining agreements and modifications thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and ;have been approved by the membership affected...

However, the situation described in your letter does not require an interpretation of

this section of the Constitution. In your situation, the rights of the employees to bump and roll from one plant to the other are governed by the provisions of an existing memorandum of agreement. Since this memorandum of agreement is already in existence and has been in existence for some time, it is not a "proposed agreement or modification thereof" requiring additional membership approval now. Thus, there is no need to determine at this time what set of members constitute the "membership affected" that would be entitled to vote on a "proposed agreement or modification thereof."

Fraternally yours,

Frank Hanley
General President

FH:dp

cc: Regional Director

(LOGO)

**ICI SPECIALTIES**

P.O. Box 152

Mt. Pleasant

Tennessee 38474

Telephone (615) 379-3257

Fax (615) 379-7124

August 27, 1991

Mr. Thomas Alexander

Local Union 912

International Union of

Operating Engineers

111 New Nashville Highway

Columbia, TN 38401

Dear Mr. Alexander:

The enclosed document was recently left at our plant. We are sending the document to you. We

understand that the people whose signatures appear on the document are current or former Rhone-Poulenc employees represented by the International Union of operating Engineers. They are not employees of ICI. Further, we understand that the document relates to a collective bargaining agreement that the International Union of Operating Engineers has with Rhone-Poulenc. ICI is not a party to that collective bargaining agreement.

Sincerely,

ICI AMERICAS, INC.

/s Stanley M. Straker
Stanley M. Straker
Site Manager

Enclosure

SMS/tlr

(LOGO)

**ICI SPECIALTIES**

P.O. Box 152

Mt. Pleasant

Tennessee 38474

Telephone (615) 379-3257

Fax (615) 379-7124

September 12, 1991

W. B. Hendry

Rhone-Poulenc

P O Box 472

Mt. Pleasant, Tn 38474

Dear Mr. Hendry:

I hereby return to you the documents entitled "Notice of Intent" signed by numerous

employees which you sent to Bob Stringer by letters dated August 27, September 4 and September 6, 1991. The documents you sent have no application to ICI Americas Inc. No current or former employee of Rhone-Poulenc has "rights to move to" ICI Specialties, Mt. Pleasant plant.

Any persons interested in employment with ICI, including current or former employees of Rhone-Poulenc, are free to fill out employment applications with our company. Applications for persons who are or were employed with Rhone-Poulenc will be considered on the same basis as applications submitted by any other person.

Sincerely,

/s Stanley M. Straker
Stanley M. Straker
Plant Manager

cc: C. Boyd
B. Francis

(LOGO)

October 15, 1990

Mr. Lee Suydam
Regional Manager for Employee Relations
Rhone-Poulenc Basic Chemical Co.
Post Office Box 1381
Houston, Texas 77251

Re: Operating Engineers - ICI Americas
and Rhone-Poulenc

Dear Mr. Suydam:

I enjoyed talking with you on Monday, and as we discussed, enclosed please find a copy of the Complaint which I am going to file in the District Court in Nashville concerning the September 1982 memorandum of agreement. As we discussed, ICI has stated

its intention not to honor the agreement, although it is a part of the Operating Engineers contract with them. As we also discussed, I consider this a friendly lawsuit as we are only asking the court to declare the rights of the parties, and not for damages or anything else. If, after reviewing the Complaint, you have any thoughts or suggestions, please do not hesitate to contact me.

With best regards, I am

Sincerely yours,

/s C. Dewey Branstetter, Jr.
C. DEWEY BRANSTETTER, JR.

CDBjr:kac
suydam.ltr